



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mabati Rolling Mills Ltd v Civicon (K) Limited; AEA Limited & another (Objector)  
(Civil Suit 295 of 2018) [2023] KEHC 17676 (KLR) (Civ) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 295 OF 2018**

**AA VISRAM, J**

**MAY 24, 2023**

**BETWEEN**

**MABATI ROLLING MILLS LTD ..... PLAINTIFF**

**AND**

**CIVICON (K) LIMITED ..... DEFENDANT**

**AND**

**AEA LIMITED ..... OBJECTOR**

**EQUITY BANK LIMITED ..... OBJECTOR**

**RULING**

1. This ruling determines the 1<sup>st</sup> Objector's Notice of Motion dated 18<sup>th</sup> January, 2022 and the 2<sup>nd</sup> Objector's Notice of Motion dated 20<sup>th</sup> January, 2022. The 1<sup>st</sup> Objector's motion sought the following orders:-
  - i. Spent.
  - ii. Spent.
  - iii. The Decree Holder through his agents, including Icon Auctioneers or any other Auctioneers, whether by themselves or their representatives, servants, agents, and/or assigns or howsoever acting be precluded from proclaiming or having proclaimed, from attaching, auctioning or selling the Objector's Motor Vehicles and other movable properties particularized in the schedules to Notices of Proclamation dated 16<sup>th</sup> March 2021.
  - iv. The costs of this Application be provided for.



2. The application is premised on the grounds on the face of the application and the further grounds in the supporting affidavit of Mr. Nicholas Kithinji, the Chief Executive Officer of the 1<sup>st</sup> Objector/Applicant herein, sworn on 18<sup>th</sup> January, 2021.
3. The 1<sup>st</sup> Applicant deponed that it learned of the outstanding attachment warrants issued by this court when its motor vehicles were seized on 18<sup>th</sup> January, 2022. Their concern was that the said cars and equipment would be sold at its expense and to its disadvantage.
4. The 1<sup>st</sup> Applicant further stated that it had never been a party to the substantive law suit, and accordingly, it was not aware of the default judgment. It claimed that it has a legal and or equitable interest in the subject motor vehicles having purchased them in accordance with a sale agreement dated 12<sup>th</sup> June, 2019, for Kshs. 200 million, which sum was paid on 13<sup>th</sup> September, 2019, transferring the title to it.
5. The 1<sup>st</sup> Applicant further, averred that the said equipment ought not to be attached in fulfillment of the court decree granted in favor of the Plaintiff because the Defendant (“Judgment Debtor”) does not have legal or equitable ownership over the same. Additionally, the Objector stated that it had financial commitments with third parties when it was suing for the said motor vehicles to fulfill an ongoing contract.
6. The Plaintiff (“Decree Holder”) filed a replying affidavit sworn by Mr. Antony Miring’u Kung’u on 17<sup>th</sup> February, 2022. Mr. Kung’u deponed that the purported sale agreement referred to by the 1<sup>st</sup> Objector stated that the purchase price was to be paid through RTGS to a nominated bank, but no such RTGS transfer has been produced in support of the receipt on record.
7. The Plaintiff further stated that the evidence presented does not show that the motor vehicles listed in the schedule are the subject of the alleged agreement; that the original Log Books were transferred to the 1<sup>st</sup> Objector; or that a deed of title was executed in its favor.
8. In response to the above, Mr. Kithinji swore an undated supplementary affidavit on behalf of the 1<sup>st</sup> Objector. He deponed that the aforementioned sale agreement was legally binding, and that the receipts attached were sufficient proof that the same had been paid for. He stated that there was no legal requirement to produce an RTGS as proof of payment.
9. The second application before this court is the Notice of Motion dated 20<sup>th</sup> January, 2022 (“the Second Application”) taken out by the 2<sup>nd</sup> Objector/Applicant, whereof it sought for the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. The 1<sup>st</sup> Respondent through his agents including Icon Auctioneers or any other Auctioneers, whether by themselves or their representatives, servants, agents, and/or assigns or howsoever acting be precluded from proclaiming or having proclaimed, from attaching, or selling the Objector’s equipment in answer of the Order of this Honourable Court.
  - iv. The costs of this application be provided for.
10. The second Application is premised on the grounds on the face of the application and the further grounds stated in the supporting affidavit of Mr. Kariuki Kingori, the Manager Legal Services of the 2<sup>nd</sup> Objector/Applicant herein, sworn on 18<sup>th</sup> January, 2021.



11. Mr. Kingori deponed that the 2<sup>nd</sup> Applicant came to learn of the Decree Holder’s intention to attach the following motor vehicles, namely: KCC 548E, KCC 536E, KCE 455T, KCC 946L, KCN 367N, KCD 825T, KCN 378N and KCE 422T through ICON Auctioneers, who were under the instructions of the Decree Holder.
12. Mr. Kingori deponed that the 2<sup>nd</sup> Objector had never been a party to the substantive suit between the parties, and therefore, only came to learn of the warrants of attachment by happenstance. He deponed that some of the attached motor vehicles are jointly registered in the name of the Judgment Debtor and the 2<sup>nd</sup> Objector. Further, that the bank has registered rights which take priority over any possible third-party creditors, and which prevail over the rights of other parties.
13. In opposition to the above, Mr. Kung’u for the Decree Holder, deponed that despite joint registration of the titles in respect of the said vehicles in the names of the said 2<sup>nd</sup> Objector and the Defendant / Judgment Debtor, the 2<sup>nd</sup> Objector has not evidenced nor disclosed the extent of the Defendant/ Judgment Debtor’s outstanding liability to itself.
14. Further, that there is a disclosed proprietary interest in the very same motor vehicles by the 1<sup>st</sup> Objector, which in the absence of any rebuttal, severely erodes and blemishes the 2<sup>nd</sup> Objector’s assertions as the sole basis for halting the execution process.
15. He deponed that the 2<sup>nd</sup> Objector has not demonstrated any interest whatsoever, and does not object to the attachment of 10 containers (40 inch) as well as scrap metal.
16. Finally, that no interest had been disclosed, and no objection has been made to the attachment of motor vehicles KBU 406R, KAH 652X, KBU 409R, KBL 902Z and KHMA 916B.

## **2<sup>nd</sup> Applicant/Objector’s submissions**

17. The bank submitted that the primary issue is whether the Objector has a legal or an equitable interest in the proclaimed property. It relied on the authority of *Dubai Bank (K) Ltd v Come -Cons Africa Ltd and IMPACK Holdings Co. Ltd*, 2012 eKLR in support of its argument that in arriving at its determination, the court cannot make a finding as to ownership of the property, but simply decides if the Objector has an interest, legal or equitable, in the attached property.
18. Further, that such interest in the property must be evidenced. See *Akiba Bank Ltd v Jetba & Sons Ltd* 2005 eKLR. It submitted that it had shown such evidence by way of providing attached Registration Certificates for each of the attached vehicles, which were jointly registered in the names of the Judgment Debtor and the bank, as seen in the log books relating to the proclaimed vehicles.
19. It submitted that based on Section 8 of the *Traffic Act*, Cap 403, the log books were evidence of its ownership in the said vehicles. The said section reads as follows:-
 

“ a person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”.
20. Further, that based on the joint registration, its right over the said vehicles ought to prevail over the rights of the Decree Holder. It cited the authority of *Michael Kwena v Raza Properties Limited & Another* [2008] eKLR, *Securicor Kenya Ltd v Kyumba Holdings*, Civil Appeal No.73 of 2002 (Tunoi, O Kubasu Deverell JJA) where it was held that:-

“ Our holding finds support in the decision in *Osapil v Kaddy* (2000) 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only



prima facie evidence of title to a motor vehicle, registered was presumed to be the owner thereof unless proved otherwise.”

21. And further, the decision of the High Court in *Stephen Kiprotich Koech v Edwin K Barchilei & Joel Sitienei (Objector)* 2019 eKLR, where the court held:-

“The core of objection proceedings, the Objector must adduce evidence proceedings, the Objector must adduce evidence to show that at the date of the attachment, there was a legal and equitable interest in the property attached.”

22. Finally, that the auctioneers are under a duty to investigate the ownership of any property before attachment, which they did not do, and accordingly, ought to pay the costs of the proceedings.

#### **Plaintiff/1<sup>st</sup> Respondent’s submissions**

23. In relation to the 1<sup>st</sup> Objector, the Plaintiff submitted that the agreement relied on was insufficient to make out its case.
24. As regards the 2<sup>nd</sup> Objector, the Plaintiff stated that the bank has not disclosed the Judgment Debtor’s present outstanding liability to it. Further, that the log books are old, having been issued in the years 2015 and 2017. It queried the legal and or equitable status of the bank at the time of attachment of the vehicles. It cited the authority of *Stephen Kiprotich (supra)*, in support of its submission.
25. Further, that the bank had not proved its interest in all of the vehicles attached, namely, those referred to in the Plaintiff’s deposition as stated above.

#### **Analysis and determination**

26. I have carefully considered the pleadings, evidence, and written submissions by the respective parties in respect of the two applications. The Objector’s applications are brought under Order 22 Rules 51 and 52 of the *Civil Procedure Rules* which provide as follows:
- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time, prior to payment out of the proceeds of sale of such property, 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.
  - (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such Objector or person makes to the whole or portion of the property attached.
  - (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than 14 days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days, whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”
27. Based on the law as set out above, the onus lies on the Objector to establish its legal or equitable interest in the properties, which are the subject matters of the proclamation and attachment objected to, and not for the Decree Holder to prove that the goods belong to the Defendant. This position was affirmed



by the decision of the High Court in *Simba Colt Motors Ltd v Lustman & Co.* (1990), HCCC No. 729 of 2002, where the court held that:-

“The purpose of Rule 57 is to provide the Objector with an opportunity to establish his claim to the attached moveable property. The rule casts the onus of proof on the Objector to prove that the property belonged to him and not, as submitted before me, for the Decree-Holder to prove that the property belonged to the Judgement-Debtor.”

28. Further, in the case of *Chotabhai M. Patel v Chaprabhi Patel* [1958] EA 743, the court stated that:-

- a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment, the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.
- b) The Objector shall adduce evidence to show that at the date of attachment, he had some interest in the property attached.”
- c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is thus, one of possession of, and some interest in the property.
- d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.”

29. Further to the above, In the case of *Akiba Bank Ltd v Jetha & Sons Ltd* (2005) eKLR, the court held that for an Objector to succeed in his objection, he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.

30. The issue for determination by this Court therefore, is whether the Objector has shown a legal or equitable interest in the proclaimed and attached properties, to be entitled to the orders it seeks. The Objectors have annexed a Sale Agreement dated 12<sup>th</sup> June, 2019 between the 1<sup>st</sup> Objector and the Judgment Debtor; and copies of logbooks showing the joint registration of motor vehicles registration numbers: KCC 949L, KCC 548E, KCC 536E, KCE 455T, KCC 946L, KCN 367N, KCD 825T, KCN 378N and KCE 422T, in the name of the 2<sup>nd</sup> Objector and the Judgment Debtor.

31. In this regard, I am guided by the decision by my brother, Odunga J (as he then was) in *Dubai Bank (K) Ltd v Come-Cons Africa Ltd and Impak Holdings Co Ltd.* stated as follows:-

“Although the law is that in the objection proceedings, the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the Objector has interest, legal or equitable, in the attached property, it is equally true that the onus of proof in objection proceedings is on the Objector to establish ownership see *Chatabhai M. Patel & Another Hccc No. 544 of 1957 (Lewis) on 8/12/58 HCU (1958) 743.*” emphasis added



32. The question is whether the Objectors have, in this case, established on a balance of probability their interest in the attached goods. From the documentary evidence of copies of log books / registration certificates in relation to the specific vehicles named above, and tendered before this Court, I am satisfied that the 2<sup>nd</sup> Objector has established its legal interest in the attached motor vehicles.
33. I am further guided by Section 8 of the Traffic Act which reads as follows:-
- “The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle”.
34. Therefore, prima facie, the 2<sup>nd</sup> Objector is deemed to be a joint owner of the said vehicles.
35. In the instant case, the 2<sup>nd</sup> Objector having produced the logbooks which disclose it as a joint registered owner of the vehicles in question, and the legal presumption being in its favour, the evidential burden shifted onto the Decree Holder to prove the contrary as stated in Section 8 of the Traffic Act.
36. I have noted the submission by the Decree Holder that several of the certificates of registration are dated between the years 2015 to 2017, rather than the present date. However, the Decree Holder did not produce more recent certificates to show that the ownership has since changed. Guided by the principle that it is not this court’s duty to make findings as to ownership of the property being the subject of the objection proceedings, but simply to decide whether or not, on a balance of probability, the Objector has interest, legal or equitable, in the attached property, I am satisfied that the 2<sup>nd</sup> Objector has done so in respect of the jointly registered vehicles stated above.
37. As regards 1<sup>st</sup> Objector’s interest, I am unable to reach the same conclusion. Looking at the Sale Agreement tendered as evidence, I am unable to identify specifically, which of the proclaimed goods the Objector is claiming an interest in. I am satisfied that the 1<sup>st</sup> Objector has failed to discharge the burden of proof to the requisite degree of probability as is required, and as stated above.
38. Based on the reasons stated above, I find that the Notice of Motion dated January 18, 2022, is dismissed with costs.
39. I find that the Notice of Motion dated 20<sup>th</sup> January, 2021, is with merit and I allow the same. I note that the Auctioneers are not a party to the present proceeding and accordingly, I am not inclined to make any orders against them. I think it is appropriate for each of the parties to bear their own costs in relation to the application dated 20<sup>th</sup> January, 2021.
40. The orders of this court are as follows:-
- a. The 1<sup>st</sup> Respondent, the Decree Holder herein, through his agents, including Icon Auctioneers, or any other Auctioneers, whether by themselves or their representatives, servants, agent, and/or assigns or however acting are hereby precluded from proclaiming or having proclaimed, from attaching, or selling the vehicle registration Numbers: KCC 949L, KCC 548E, KCC 536E, KCE 455T, KCC 946L, KCN 367N, KCD 825T, KCN 378N and KCE 422T.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF MAY 2023**

**ALEEM VISRAM**

**JUDGE**

In the presence of;



.....for the Plaintiff

.....for the Defendant

.....for the Objector

