



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**ELECTION PETITION NO. 2 OF 2013**

**THOMAS MALINDA MUSAU.....1<sup>ST</sup> PETITIONER/JUDGEMENT DEBTOR**

**STEPHEN NDAMBUKI MULI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**JOHN NTHULI MAKENZI.....3<sup>RD</sup> PETITIONER/APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**LEONARD OKEMWA**

**(RETURNING OFFICER).....2<sup>ND</sup> RESPONDENT**

**STEPHEN MUTINDA MULE.....3<sup>RD</sup> RESPONDENT/DECREE HOLDER**

**AND**

**RUTH ANYANGO ODHIAMBO.....OBJECTOR**

**RULING**

1. By its Notice of Motion dated 29<sup>th</sup> July, 2020, expressed to be brought under the provisions of Order 22 rule 51 of the *Civil Procedure Rules*, the objector is seeking the following orders:

**1) Spent.**

**2) THAT pending the hearing and determination of this application, an order do issue staying all the execution proceedings against the applicants.**

**3) THAT any orders of attachment and/or proclamation against the objector's property - M/V REG No. KBL 658D as set out in the attached proclamation in this suit to be declared null and void ab initio and the same be lifted and set aside.**

**4. THAT a declaration that the objector is not one of the judgement debtors herein and is thus a stranger to the proceedings in this suit do issue.**

**5) THAT costs of this application be in the case.**

2. According to the Objector, she is the registered owner of motor vehicle registration no. KBL 658D. Due to the lockdown imposed in a bid to contain COVID 19 pandemic the said vehicle had remained in the 3<sup>rd</sup> Petitioner/Judgement Debtor's compound in Tala for quite some time as she was unable to travel or send a driver to take it to her.

3. While the said vehicle has been listed in the proclamation dated, 29<sup>th</sup> June, 2020, she is not and has never been a party to these

proceedings and that the said vehicle does not belong to the 3<sup>rd</sup> Petitioner/Judgement Debtor herein hence cannot be sold in satisfaction of his debts.

4. The Objector maintained that she has a legal, equitable and beneficial interest over the said vehicle and stand to suffer greatly if the same is disposed of, a likelihood which in her view is very real. She therefore sought an order lifting the said attachment.

5. In support of the application the Objector attached copies of the Registration Certificate, current search certificate and the proclamation.

6. Two replying affidavits were filed in response to the said application. One affidavit was sworn by the 3<sup>rd</sup> Respondent/Decree Holder's advocate which was based on the information given to him by the Auctioneer while the other affidavit was sworn by the auctioneer, **Philip M. Kamuya**. According to the Auctioneer, on 15<sup>th</sup> June, 2020- he was issued with warrants of attachment to execute against Thomas Malinda, Stephen Muli and John Makenzi, the Petitioners herein in order to recover the sum of Kshs 2,621,789/=. After carrying out investigations for more than a week to establish the attachable properties of the said Judgement Debtors, on 29<sup>th</sup> June, 2020 he proceeded to the 3<sup>rd</sup> Petitioner/Judgement Debtor's School located at Tala but found it closed due to COVID 19 pandemic. He then proceeded to the 3<sup>rd</sup> Petitioner/Judgement Debtor's house also located within Tala where upon arrival, he found one Janet, who introduced herself as the 3<sup>rd</sup> Petitioner/Judgement Debtor's wife. After explaining the purpose of his visit, the Auctioneer served her with the Proclamation Notices which she accepted but declined to append her signature. He then found the suit vehicle parked in the parking lot at the 3<sup>rd</sup> Petitioner/Judgement Debtor's house.

7. According to the Auctioneer, his investigations revealed that the said vehicle was always in the 3<sup>rd</sup> Petitioner/Judgement Debtor's possession either at his residence, his construction site or at his school and that he was using the same to attend to his official duties. According to him, he then proclaimed motor vehicle Reg Nos. KBA 136H and KBL 658D Lexus because they were in actual possession of the 3<sup>rd</sup> Petitioner/Judgement Debtor and who was the one using the same and or were being driven under his authority. After proclaiming the same he proceeded to advertise motor vehicle Reg No. KBA 136H for sale but motor vehicle Reg No. KBL 658D was hidden by the 3<sup>rd</sup> Petitioner and he was unable to trace the same.

8. In his opinion the signatures on the logbook and the supporting affidavit differ which in his view means that they were not signed by the same person. He further opined that ownership of a motor vehicle can be proved by means other than registration. In his view the 3<sup>rd</sup> Petitioner/Judgement Debtor bought the said vehicle from the Objector but has not effected transfer into his name.

9. On behalf of the Objector, it was submitted that the objector herein has never been a party to these proceedings. Since she has legal and equitable interests in motor vehicle registration number KBL 658 D, her property cannot be used to satisfy a decree of this court against the judgment debtors herein.

10. The Objector also took issue with the fact that the replying affidavit was sworn by counsel for the Decree Holder and submitted that an advocate cannot and should not depose or engage himself in the realm of evidence in a matter he is appearing, particularly in contentious issues. The court was therefore urged to strike out certain paragraphs of the said affidavit for being incompetent. This submission was based on the provisions of the *Advocates Practice Rules* and Order 19, rule 3 of the *Civil Procedure Rules* the cases of **Francis Kimutai Bii vs. Kaisugu(Kenya) Ltd(2016) eKLR**, **Nicholas Kipchirchir Kimaiyo vs. Wilson Kibet Kimutai & Another (2014) eKLR**, **Barrack Ofulo Otieno vs. Instarect Limited (2015) eKLR** and **Regina Waitihira Mwangi Gitau vs. Boniface Nthenge (2015)** and it was submitted that Counsel for the Decree Holder was not involved in carrying out the investigations, if any. The Objector also relied on Order 22 rule 51(1) of the *Civil Procedure Rules*.

11. According to the Objector, it has been settled that the burden of proving ownership of attached property lies on the objector based on the case of **Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR** and the case of **Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR**.

12. According to the Objector, the main issue for determination in this limb is whether the objector is the owner of motor vehicle registration number KBL 658 D. It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise and relied on Section 8 of the *Traffic Act*.

13. It was submitted that in her supporting affidavit, the objector laid a factual basis explaining why her motor vehicle was in the compound of the third petitioner. She had been unable to assume control of the same due to the nationwide lockdown imposed by the President in a bid to contain the Covid 19 Pandemic. Further, the Objector attached a copy of the log book which clearly showed that she owned the motor vehicle. She also attached a copy of a search carried out at the time of filing the application which confirmed the same position, that she was indeed the registered owner of motor vehicle KBL 658 D.

14. According to the Objector, the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. However, no evidence to the contrary has been adduced by the decree holder in this case. While the Auctioneer alleged that he carried out investigations, he did not state what investigations were carried out and no evidence has been tendered to support his allegations. According to the Objector, section 109 of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on him.

15. In this case it was submitted that the deponent is not a handwriting expert and he cannot be in a position to confirm or deny the authenticity of the signature on the supporting affidavit. Signatures vary from time to time and are affected by several factors and reliance was placed on **Simon Peter Gachi Benard vs. Agnes Nungari Muriithu & 2 Others [2014] eKLR**

16. It was submitted that the Auctioneer's averments clearly show that he did not exercise due diligence to ascertain who exactly owned the

properties he proclaimed. Therefore, the contents of his affidavit remain to be mere allegations.

17. It was therefore submitted that the Objector has fully proved to this court that she has legal and equitable title to the attached motor vehicle based on the case of **Samuel Ojwang Juma vs. Sapphire Collections Ltd; Dilip Gudka & 2 Others (t/a Raili Enterprises) (Objector) [2019] eKLR** and it was urged that the application is merited and the same should be allowed.

18. On behalf of the 3<sup>rd</sup> Respondent/Decree Holder, it was submitted that the application dated 29<sup>th</sup> July 2020 is improperly before this court as the High court lacks the jurisdiction to entertain this application. According to the Respondent, prayer number 2 of the application dated 29<sup>th</sup> July 2020 seeks for an order of stay of all execution proceedings against the applicants pending the hearing and determination of this application. The objector cannot seek stay of all execution proceedings against the applicants who are judgement debtors in this suit and still claim at the same time that she is not a judgement debtor and therefore a stranger to this suit. If she claims to be a stranger to this suit then she has no locus standi to seek a prayer for stay of execution. This only illustrates that the application has been brought by the applicants in disguise.

19. It was submitted that they are clutching at any straw to improperly seek for a stay of execution 7 years after judgement was entered against them hence denying the 3<sup>rd</sup> respondent his right to enjoy the fruits of the judgement issued in his favor.

20. It was further submitted that the application itself has been brought subject to execution of costs that were awarded by the taxation officer pursuant to a decision by the Court of Appeal. The taxing officer is implementing a decision of the Court of Appeal and not this court. Therefore, any application challenging the implementation of the order/decreed of the court must be made to the court that issued the decree/order. In this case this application should have been made to a judge sitting in the Court of Appeal. This instant application is therefore misconceived and incompetent for want of jurisdiction. According to the 3<sup>rd</sup> Respondent, this court had already pronounced itself regarding the issue of jurisdiction in this matter in a ruling delivered by on the 20<sup>th</sup> of June 2019.

21. It was further submitted that since Mr. Kiugu has sworn the replying affidavit in his capacity as the advocate for the 3<sup>rd</sup> respondent, his affidavit is therefore properly filled before this court since he has been in conduct of the matter from its inception. Furthermore, the affidavit discloses sources of information where he relies on information from a third party.

22. It was further submitted that it is also trite law that parties are bound by their pleadings and cannot be allowed to depart from them. The objector has not specifically pleaded on the process of execution. For the applicant to submit that the issues raised by Mr Kiugu in his replying affidavit dated 10<sup>th</sup> August 2020 which he has deposed based purely on the information he received from the auctioneer are contentious would be misleading the court as the method /process of execution by the auctioneer is not in contention. In any case your, the auctioneer Mr. Philip trading as M/S Crater View Auctioneers has also sworn an affidavit to corroborate the information he gave Mr. Kiugu Advocate hence the replying affidavit of the 3<sup>rd</sup> petitioners' advocate and the auctioneer are properly before court.

23. According to the 3<sup>rd</sup> Respondent, there is no prayer challenging the mode of execution.

24. It was submitted that the presumption in section 8 of the **Traffic Act** is rebuttable and in the sworn affidavit of Philip M. Kamuya trading under the name and style of M/S Crater View Auctioneers he states that upon further investigations it came to his notice that motor vehicle registration number KBL 658D Lexus has always been in the possession of the 3<sup>rd</sup> Petitioner, John Nthuli Makenzi. Further that vehicle is always either at his construction site, at his home or at his school and he uses the same vehicle to attend to his official duties. There is nowhere in the auctioneer's replying affidavit where he has deposed that his investigations established the 2<sup>nd</sup> petitioner as the owner of the motor vehicle. To the contrary he has deposed that his investigations established that the owner of the vehicle was the 3<sup>rd</sup> petitioner. The court was urged to consider the exception to section 8 of the **Traffic Act** because in this case it has been fragrantly used to oppose justice.

25. According to the 3<sup>rd</sup> Respondent, it is trite law that he who alleges must prove. The objector has not demonstrated exactly how the auctioneer failed to exercise due diligence to establish the true and legal owner of the attached motor vehicle.

26. According to the 3<sup>rd</sup> Respondent, since a look at the signature of the objectors replying affidavit and the signature contained in the certificate/logbook shows on the face of it that the signatures are very different, the signature in the affidavit supporting the application was not signed by the objector. It was submitted that the application before this honourable court is to determine whether indeed the objector has legal and or equitable interest in the attached motor vehicle property and not mere ownership. The vehicle could be under her name but equitable interest lies with 3<sup>rd</sup> Petitioner. While in her supporting affidavit the objector swears that her vehicle remained in the third petitioner's compound in Tala for a long time as she was unable to travel or send a driver to deliver the car to her, she has not deposed neither has she sworn a further affidavit to explain how vehicle ended up in the custody of the petitioner. Therefore, the circumstances leading to possession of the vehicle by the 3<sup>rd</sup> petitioner remain unclear.

27. Based on the foregoing, this court was urged to dismiss this application with costs to the 3<sup>rd</sup> respondent.

### **Determination**

28. I have considered the foregoing. The 3<sup>rd</sup> Respondent has raised the issue of jurisdiction which is two pronged. The first limb is based on the fact that since the judgement being executed is that of the Court of Appeal, this court cannot stay that decision. To my mind the limb seeking stay of execution was an interim relief which is now spent. Accordingly, nothing turns on that issue. The second limb of the objection is that the application itself has been brought subject to execution of costs that were awarded by the taxation officer pursuant to a decision by the Court of Appeal. The taxing officer is implementing a decision of the Court of Appeal and not this court. Therefore, any application challenging the implementation of the order/decreed of the court must be made to the court that issued the decree/order. In this case this application should have been made to a judge sitting in the Court of Appeal. Section 4 of the Appellate Jurisdiction Act provides as

hereunder:

***Any judgment of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court.***

29. It is therefore clear that for the purposes of execution of the Court of Appeal decisions, the High Court is the executing court and in so doing it proceeds in the like manner as if it was executing its decision. Section 34 of the **Civil Procedure Act** provides that:

***All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.***

30. Therefore, as this is the court executing the decree of the Court of Appeal and as the matter before me relates to the execution of the decision of the Court of Appeal, it is this court that is properly seized of the determination of such matters. Accordingly, I find that this Court has the jurisdiction to determine these objection proceedings.

31. It is not in doubt that the Objector herein was not a party to these proceedings and no order has been made against her in these proceedings. She claims that her motor vehicle registration no KBL 658D was attached in execution against the 3<sup>rd</sup> Respondent herein. That the said vehicle was proclaimed within the 3<sup>rd</sup> Petitioner's residence is not in doubt. However, the Objector claims that being the owner of the vehicle, she has both legal and equitable interest over the same. Order 22 rule 51(1) of the **Civil Procedure Rules** provides as follows;

***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 parties to the decree-holder, of his objection to the attachment of such property.***

32. The Objector states that due to the travel restrictions occasioned by the COVID 19 pandemic, she was unable to collect her said vehicle from the 3<sup>rd</sup> Petitioner. She has exhibited documents of registration which show that the vehicle is registered in her name. According to Section 8 of the **Traffic Act**;

***The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.***

33. Therefore, prima facie, the Objector is deemed as the owner of the said vehicle. However, that presumption is rebuttable. That the burden of proving interest legal or otherwise, in the attached property, lies on the objector is not in doubt. This was clearly held in **Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others [2014] eKLR** where the court held as follows;

***"The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. If as the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree"***

34. Similarly, in **Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others [1993] eKLR** the court expressed itself thus:

***'The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.***

***(1) that the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or***

***(2) that the objector holds that property on his own account."***

35. However, section 109 of the **Evidence Act**, Cap 80, Laws of Kenya, places the burden of proof on him. The section provides that: -

***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.***

36. In this case the Objector having produced the logbook which discloses her as the registered owner of the vehicle and the legal presumption being in her favour, the onus shifts onto the 3<sup>rd</sup> Respondent to prove the contrary as stated in Section 8 of the **Traffic Act**. In those circumstances, the legal burden still remains on the Objector but the evidential burden shifts to the Respondent to show that despite the prima facie registration of the vehicle in the name of the Objector, the Objector does not have any interest, legal or equitable in the same.

37. In the case the Respondent takes issue with the alleged discrepancy in the signatures on the logbook and the supporting affidavit. Suffice to say that in **Simon Peter Gachi Benard vs. Agnes Nungari Muriithu & 2 Others [2014] eKLR** the court observed that:

***"... As to whether the signature on the affidavit supporting the preliminary objection is a forgery is a matter of fact which requires proof. As pointed out, there is no legal requirement confining an individual to one type of signature."***

38. Accordingly, that cannot be the basis to dismiss the Objection.

39. It is further alleged that the Auctioneer's investigations led him to believe that the vehicle was in possession of the Objector. As rightly pointed out on behalf of the Objector, the nature of these investigations are not disclosed and the people who furnished the Auctioneer with the information that the vehicle was being used for the benefit of the Objector have neither filed affidavits nor have their identifies been disclosed. The speculation that the 3rd Petitioner may have acquired the vehicle from the Objector but had not transferred the same, remains a mere speculation and no more.

40. In objection proceedings, the Court does not and cannot make findings as to ownership of the property the subject of the objection proceedings but simply decides whether or not the objector has interest, legal or equitable, in the attached property. Based on the material placed before me I am satisfied that the Objector's prima facie interest in the suit vehicle has been proved and it has not been displaced by any credible evidence from the 3rd Respondent herein.

41. Therefore, I find the Notice of Motion dated 29<sup>th</sup> July, 2020 merited and I direct that the attachment and/or proclamation against M/V REG No. KBL 658D as set out in the attached proclamation in this suit to be and is hereby lifted and set aside.

42. The costs of these objection proceedings to be borne by the 3<sup>rd</sup> Respondent/Decree Holder in this petition.

43. Those shall be the orders of this court.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of February, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Musya for Ms Munyao for the Objector**

**CA Geoffrey**