



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC CIVIL APP NO 95 OF 2016

MWANIKI GITAU & CO ADVOCATE.....APPLICANT

VERSUS

ESTHER WAMBUI NJOROGE.....RESPONDENT

KAMBUSU OLE PAKINE.....OBJECTOR

RULING (1)

1. In his Notice of Motion application dated 19th December 2019 and filed on 20th December 2019, the Objector herein sought an order the unconditional lifting of the Proclamation dated 18th December 2019 and a declaration that all office furnitures (**sic**), computers and other office equipments (**sic**) proclaimed by M/D Dancy Auctioneers in Plot No 280 and Plot No 82 (hereinafter referred to as “the subject premises”) belonged to him absolutely and that the said proclamation was illegal, null and void. He swore the Affidavit in support of the application herein on 19th December 2019.

2. He contended he was not a party to the suit herein and/or a judgment debtor and was therefore not liable to settle the decretal sum herein. He also averred that he was the lawful owner of all the assets that had been proclaimed and thus urged this court to allow his application as prayed.

3. In opposition to the said application, on 15th July 2020, Joseph Mwaniki Gitau, advocate, swore a Replying Affidavit on behalf of the Applicant herein.

4. His contention was that the auctioneers went to the aforesaid premises owned by the Respondent herein and attached her goods as aforesaid. He was emphatic that the said auctioneers did not attach the Objector’s goods at his Pewa Bar and Restaurant, where he was a customer. He pointed out that a firm known as Oloitai Butchery and Car Wash were introduced in the Notice of Objection attachment and it had no connection with the proceedings herein at all.

5. He stated that the Objections proceedings were unwarranted and urged the court to dismiss the same *ex debito justitiae*.

6. The Objector submitted that the proclamation was done by the auctioneers and the Applicant was not competent to purport to clarify who was the owner of the subject premises. He added that the Applicant did not adduce any evidence to confirm that the goods in fact belonged to the Respondent herein.

7. In this regard, he placed reliance on the provisions of Order 22 Rule 51 (1) of the Civil Procedure Rules, 2010 that provide as follows:-

“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 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.”

8. On the other hand, the Applicant submitted that no stay was issued under Order 22 Rule 52 of the Civil Procedure Rules or Notice issued to it to intimate to the court and all parties in writing within seven (7) days whether he proposed to proceed with the attachment and execution wholly and/or partly and hence the objection proceedings ended with the Notice of Objection. He also averred that the Respondent neither denied that she ran an office in the subject premises nor support the Objector’s assertion that Pewa Bar and Restaurant and Oloitai Butchery and Car Wash were tenants in the said subject premises.

9. Order 22 Rule 52 of the Civil Procedure Rules. The same provides as follows:-

“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 fourteen 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.”

10. Order 22 Rule 53 of the Civil Procedure Rules states that:-

“Should the attaching creditor in pursuance of a notice issued under rule 52 either fail to reply to the court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of a portion of the property subject to the attachment, the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

11. Further Order 22 Rule 54 of the Civil Procedure Rules stipulates that:-

“If the attaching creditor proposes to proceed with the attachment pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”

12. The court perused the court file and noted that the order for stay of execution alluded to in Order 22 Rule 22 of the Civil Procedure Rules was not granted in the first instance, a fact that was pointed out by the Applicant herein. Indeed, it was not mandatory for the court to grant the same. It was an order that could be granted upon the court exercising its discretion to grant the same.

13. However, it was mandatory for the notice under Order 22 Rule 52 of the Civil Procedure Rules to be issued by the court. This was not done. The Applicant did not also file a Notice of intention to proceed with the attachment as provided under Order 22 Rule 53 of the Civil Procedure Rules and it therefore appeared that the procedure of the objection proceedings was not completely adhered to.

14. The above notwithstanding, this court deemed it fair and in the interests of justice not to dwell on the form over substance. A very substantive issue was raised by the Objector and the court could not ignore the same. It therefore proceeded to address its mind to the merits or otherwise of the present application.

15. It did appear to this court that both the Respondent and the Objector herein were tenants in the same premises. The Objector annexed copies of licenses issued to Pewa Bar & Restaurant, a place the Applicant's deponent was a customer and Oloitai Butchery/Car Wash. The Warrants of Sale of Movable Property in execution of decree for money given on 10th December 2019 given to M/S Dancy Auctioneers were directed at the Respondent herein.

16. Having said so, it was not clear to this court which property the said Auctioneers attached. This issue would have been resolved by an affidavit sworn by them. Indeed, as the Objector correctly pointed out, the Applicant could not purport to clarify the premises where goods were attached as neither did he disclose his presence at the time of the said attachment nor disclose his source of information.

17. It would be argumentative for the Objector to show that his equipment was attached as the Applicant had contended because that is exactly what he was purporting. Rather, it would have been of more assistance to the court for the auctioneers to have sworn an affidavit explaining where they attached the goods.

18. In the absence of any other evidence to the contrary, this court found and held on a balance of probability that the Objector's assertion that the aforesaid Auctioneers attached his goods remained unrebutted and/or uncontroverted.

19. As the Objector did not provide any evidence to prove that the office furniture, computers and other attachable assets in the office belonged to him, this court was not able to issue a declaration that the same belonged to him absolutely.

DISPOSITION

15. For the foregoing reasons, the upshot of this court's decision was that the Objector's Notice of Motion application dated 19th December 2019 and filed on 20th December 2019 was merited and the same is hereby allowed in terms of Prayer Nos (4) therein with costs to him.

16. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of November 2020

J. KAMAU

JUDGE