



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
(CORAM: A.K. NDUNG'U J.)
ELECTION PETITION NO. 1 OF 2017

HEZRON GETUMA ONSONGO

T/A HEGEONS AUCTIONEERS.....APPLICANT

VERSUS

JEREMIAH NYANGWARA MATOKE.....PETITIONER/RESPONDENT

RULING

1. This is a ruling in respect of an application dated 12th October 2020. It is expressed to be brought under **Section 3, 3A, 63(e)** and **98** of the **Civil Procedure Act**; **Order 21 Rule 71** of the **Civil Procedure Rules** and **Section 9 (1) and (2)** of the **Auctioneers Rules**. The application is for orders that;

a. Spent

b. An order do issue to the applicant to break into and attach motor vehicle registration no. KCC 076G Toyota Land Cruiser V8, Motor vehicle registration no. KCE 951E, assorted furniture and assorted electronics, assorted house hold goods and/or any other movable properties of the J/debtor belonging to Mr. Jeremiah Nyangwara Matoke;

c. That the OCS Kisii Police Station/Kabete Police Station or any other Police Station whose jurisdiction the proclaimed properties may be found be directed to provide security during the breaking in and attachment of properties i.e. motor vehicle registration no. KCC 076G Toyota Land Cruiser V8, motor vehicle registration no. KCE 951E, assorted furniture and assorted electronics, assorted house hold goods execution thereto

d. The costs of this application be borne by the defendant.

2. Hezron Getuma Onsongo, an auctioneer working under the name and style of Hegeons Auctioneers, swore an affidavit in support of the application. He averred that on 29th October 2019 he received warrants of attachment and sale from the court to proclaim the respondent's goods for non-payment of a decretal sum of Kshs. 4,036,908/=. He proclaimed the respondent's properties on 30th November 2019 but was served with an order of stay of execution on 15th January 2020. He averred that since then the respondent had not made any payment towards the settlement of the decretal sum. The auctioneer is apprehensive that he will be met with resistance at the time of seizure of the proclaimed properties. He has therefore sought an order for security during the exercise of breaking in and attaching the respondent's properties.

3. The respondent opposed the application in an affidavit sworn on 2nd November 2020. He deposed that the warrants of attachment that were issued on 29th November 2019 were returnable on or before 28th January 2020, thus the application did not exhibit valid warrants of attachment. He also averred that the application does not disclose his alleged premises and cannot be granted in the amorphous manner that it has been filed. He further contended that the applicant has not demonstrated that he is the registered owner of motors vehicle registration nos. KCC 076G and KCE 951E and the assorted furniture, electronics, house hold goods and other movable goods.

4. The respondent also opposed the application for the reason that he has never been issued with a proclamation at his premises, which have not been disclosed in the application. He pointed out that he had filed an application on 22nd September 2020 to liquidate the decretal sum through installments and this application should await the outcome of that application.

5. The respondent filed grounds of opposition dated 2nd November 2020 largely reiterating the substance of his affidavit.

6. Directions were taken to dispose of the application by way of written submissions. The respondent filed submissions dated 7th December 2020 but none were filed for the applicant.

7. I have considered the submissions on record and the depositions for and against the application. In my view, the issues to be determined are:

- a. Whether the applicant has disclosed the premises he intends to break into;
- b. Whether the proclaimed goods belong to third parties;
- c. Whether a Notice to Show Cause why the decree should not be executed should issue against the respondent for the execution process to proceed;
- d. Whether it was mandatory for the applicant to issue a fresh proclamation against the respondent after stay of execution; and
- e. Whether the orders sought should be granted.

8. Following the dismissal of the respondent's Petition with costs, the parties agreed on a sum of Kshs. 4,200,000/= in costs. A sum of Kshs. 500,000/= which had been deposited in court as security was released to the respondent to offset part of the costs. The applicant avers that since then, the respondent has not made any payments towards the settlement of the amount. He now seeks orders to be allowed to break in and attach the proclaimed goods of the respondent in execution thereof.

9. The respondent contends that the application before the court does not disclose the premises that the applicant wishes to break into and that the proclaimed goods do not belong to him. He has referred this court to **Order 22 Rule 8** of the **Civil Procedure Rules** which provides:

8. Application for attachment of movable property not in judgment-debtor's possession [Order 22, rule 8.]

Where an application is made for the attachment of any movable property belonging to a judgment-debtor, but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

10. The applicable process in the attachment of movable goods is laid out in **Rule 12 (1)** of the **Auctioneers Rules** as follows:

12 (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
- (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;
- (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
- (e) ensure safe storage of the goods pending their auction;
- (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
- (g) not remove any goods under the proclamation until the expiry of the grace period.

11. Applications for provision of security during the execution process are provided for in **Rule 9** of the **Auctioneers Rules** thus:

9(1) Where an auctioneer has reasonable cause to believe that—

- (a) he may have to break the door of any premises where goods may be seized or repossessed; or
- (b) he may be subject to resistance or intimidation by the debtor or other person; or
- (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

12. The proclamation of attachment of the respondent's goods is dated 30th November 2019. It lists the goods to be attached, states the condition of the items and other than the vehicles, it indicates where the assorted furniture, electronics and household goods are situated. Some items are said to be located at Water front Gardens Estate in Nairobi and other items at the Nyagenke home. It is this proclamation notice that the applicant seeks to enforce by breaking into and attaching the listed goods. The claim that the application is ambiguous is therefore unfounded.

13. The respondent's argument that the proclaimed goods belong to third parties is inconsequential in the present case. Third parties claiming an interest in property attached in execution of a decree may file objection proceedings under **Order 22 Rule 51** of the **Civil Procedure Rules**. If found merited the court would make an order raising the attachment on the property in which the third party has an interest. Such an application was filed and dismissed by this court on 3rd August 2020.

14. The application has also been challenged on the ground that where the decree was issued more than one year prior, the mode of execution provided in the Civil Procedure Rules should apply. The respondent referred to **Order 22 Rule 18** of the **Civil Procedure Rules** which provides that the judgment debtor should be issued with a Notice to Show Cause where an application for execution is made more than a year after the date of the decree.

15. **Order 22 Rule 18** provides:

18 (1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

16. The *proviso* to **Order 22 Rule 18** above, clearly states that no Notice to Show Cause is necessary if a year has passed since the issuance of the decree and the application for execution is made within one year from the date of the last order on a previous application for execution.

17. The decree in this case was passed on 2nd April 2019. Warrants of attachment and sale were issued on 29th October 2019, within a year of the decree. Although the respondent is right in his argument that the warrants of attachment issued on 29th October 2019 lapsed on 28th January 2020, the record shows that the applicant applied and was issued with fresh ones. The fresh warrants of attachment and sale were issued on 19th August 2020. Given that the subsequent application for fresh warrants was made within a year of the previous orders for execution, it was not necessary to issue the respondent with a Notice to Show Cause.

18. I now turn to the respondent's argument that there should have been a fresh proclamation after the court had stayed the execution process. **Rule 12 (4)** of the **Auctioneers Rules** gives guidelines on the course to be taken where the execution process had been stayed. It provides:

12 (4) Where orders obtained by a judgement debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall—

(a) where the warrants of attachment and sale, or letter of instruction, are still valid, proceed with execution in compliance with these Rules;

(b) where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution;

(c) where fresh warrants of attachment and sale or letter of instructions are issued with new figures, proceed in the manner provided in these Rules in respect of a fresh warrant.

19. I agree with the interpretation of the above provision by Gikonyo J. in the case of *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others Misc. Civil App No. 802 of 2010 [2014] eKLR*. The learned judge held as follows:

... Rule 12(4) is clear. It deals with situations where a judgment-debtor had obtained orders of stay but which were subsequently vacated as is the case here. I should think that, in such case, if the previous warrants under which the proclamation had been issued were valid, the expiry thereof during the tenure of the order of stay of execution does not invalidate the previous process including proclamation. Proclamation is part of the process of execution and stay order issued after proclamation stays only further execution and does not invalidate the proclamation especially when it is vacated subsequently. Therefore, if the court vacates the stay of execution but does not invalidate the proclamation of property under attachment, execution shall proceed and be finalized without any legal necessity to issue a fresh proclamation. Any practice to the contrary would be objectionable in law.

20. The conclusion to be drawn from the above discourse is that a stay of execution does not invalidate a proclamation of property. Where the warrants of attachment and sale are valid, the execution process proceeds to its logical conclusion.

21. In this case, a stay of execution was issued by the court on 20th December 2019 pursuant to objection proceedings filed by third parties. At the time, the warrants of attachment and sale issued on 29th October 2019 were still valid as they were returnable on 28th January 2020. The stay of execution did not invalidate the proclamation of properties by the applicant. The applicant was issued with fresh warrants of attachment and warrants of sale on 19th August 2020. He now seeks to enforce those warrants of attachment and sale. He expects to break into the respondent's premises to give effect to those warrants. His application thus comes within the threshold provided in **Rule 9** of the **Auctioneers Rules**.

22. For the foregoing reasons, I allow the application dated 12th October 2020 with costs to the applicant.

Dated, signed and delivered at Kisii this 16th day of December, 2020.

A. K. NDUNG'U

JUDGE