



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 157 OF 2007

KEPHAR KISIANGANI LUMUKANDAPLAINTIFF

VERSUS

MASH BUS SERVICES.....DEFENDANT

AND

MASH EAST AFRICA LTD.....OBJECTOR

RULING

The Application

The Objector herein has filed an application by way of a Notice of Motion dated 20th November 2013 seeking orders from this Court that the proclamation and/or attachment of its goods is wrongful, and that the said attachment be lifted and the said properties be released forthwith to him. The Objector also sought orders that the Plaintiff be condemned to settlement of the auctioneers charges. The properties alleged to have been proclaimed and attached are motor vehicles registration numbers KBT 570W, KBE 710Y, KBQ 660J, KBM 880B, KBJ 800J and KBS 036W; 5 office tables; 7 complete computers; 12 office chairs; 5 filing cabinets, 20 passenger waiting benches; 2 television sets and a DVD player.

The grounds for the application are that the Objector is the registered and beneficial owner of the said properties and the goods cannot be attached or sold by auction as it is also not the judgment debtor herein. The Objector in a supporting affidavit sworn on 20th November 2013 by Abeid Said Jumaan, and a supplementary affidavit sworn by Lennox Kitsao Shalo, who are both its General Managers, stated that it was served with the proclamation on 18th November 2013, and a copy of the same was attached. Further, that the said proclamation attached properties which belong to the Objector and not the Defendant. The deponents annexed photocopies of the logbooks and a signed transfer form with respect to the attached motor vehicles, and stated that the other properties attached were in the Objector's possession and within its compound.

The Advocates for the Objectors, Menezes & Odhiambo Associates, filed submissions dated 2nd October 2015, and reiterated relying on the decision in **Akiba Bank Ltd vs Jetha & Sons Ltd (2005) e KLR** and section 8 of the Traffic Act that they had exhibited evidence of their legal and equitable interest in the properties through the annexed logbooks of the motor vehicles. Further, that there was no connection between the Objector and Judgment debtor, and the proclamation levied against property that did not belong to the judgment Debtor was illegal.

Lastly, while citing **Channan Agricultural Contractors Kenya Ltd vs Rosemary Nanjala Oyula & 2**

Others, (2013) eKLR it was submitted that an auctioneer is under a duty to investigate the ownership of any property before attachment, and that it is the auctioneer who should take the blame and bear the costs for an unlawful attachment unless deceived by the Judgment Debtor.

The Response

The Plaintiff/Decree Holder opposed the application in a Replying affidavit he swore on 2nd December 2013, wherein he stated that the log book of the motor vehicle registration number KBE 710Y showed that it belonged to the judgment debtor, and no explanation had been given as to why it was in their possession. It was also averred that the Objector did not avail any documents to indicate that they are the owners of the chattels listed in the proclamation. It was his contention that the Objector's application is meant to delay the fruits of his judgment. Further, that the proclamation was regular and lawful, and that Objector's application lacks merit and is an abuse of the court process, and the same should be dismissed with costs.

The above arguments were reiterated in submissions dated 19th March 2015 filed by Mulu & Company Advocates, the Plaintiff's Advocates.

The Issue and Determination

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The Objector's application is brought under Order 22 Rules 51 and 52 of the Civil Procedure Rules which provide as follows:

51. (1) 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.

(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 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."

The burden of proof is on the Objector to establish its legal or equitable interest in the properties which are subject matter of the proclamation and attachment objected to, and it is not for the decree holder to prove that the goods belong to the Defendant. It was stated as follows in this regard by Hon. Waki J. (as he then was) in **Simba Colt Motors Ltd vs Lustman & Co. (1990)** , HCCC No. 729 of 2002 :

"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."

The issue before the 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 brought evidence of the logbooks showing the registration of motor vehicles registration numbers KBQ 660 J, KBM 880B, KBJ 800J, and KBS 036W in their name. No such logbook was provided for motor vehicle registration number KBT 570W. The Objectors have also annexed a transfer form between itself and the

Defendant with respect to motor vehicle registration number KBE 710Y.

I note that the said transfer form is undated, and is not accompanied by any other supporting document to show the context in which it was being executed, or whether it was ever presented for registration. In my view, the said transfer form is not sufficient evidence to demonstrate that the Objector has equitable rights over motor vehicle registration number KBE 710Y, whose log book shows that it is registered in the Defendant's name.

On the attached chattels, the averments by the Objector that the same were in its possession and premises at the time of the attachment is not disputed by the Plaintiff/Decree Holder.

In the premises the Objector's application dated 20th November 2013 only partially succeeds, and only with respect to motor vehicles registration numbers KBQ 660J, KBM 880B, KBJ 800J and KBS 036W; 5 office tables; 7 complete computers; 12 office chairs; 5 filing cabinets, 20 passenger waiting benches; 2 television sets and a DVD player. This is for the reason that the Objector has not been able to satisfactorily show its ownership of motor vehicles registration numbers KBT 570W and KBE 710Y, and for the same reason I cannot order that the Plaintiff /Decree Holder be condemned to pay the auctioneers fees.

The orders of this Court are accordingly as follows:

1. That the proclamation and/or attachment by the Plaintiff /Decree Holder of motor vehicles registration numbers KBQ 660J, KBM 880B, KBJ 800J and KBS 036W; 5 office tables; 7 complete computers; 12 office chairs; 5 filing cabinets, 20 passenger waiting benches; 2 television sets and a DVD player being properties of the Objector is wrongful, and that the said proclamation and/or attachment be and is hereby lifted and the said properties be forthwith released to the Objector.
2. The orders sought with respect to motor vehicles registration numbers KBT 570W and KBE 710Y are hereby declined.
3. Each party shall bear their own costs of the said application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of January 2016.

P. NYAMWEYA

JUDGE