



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 129 OF 2014

MALIHA ALI SHEIKH.....PLAINTIFF

- VERSUS -

ARVIND KASHMIRILAL BYUTIYANI...1ST DEFENDANT/JUDGEMENT DEBTOR

SUDHA ARVIND BHUTIYANI.....2ND DEFENDANT/JUDGEMENT DEBTOR

DREAM CREDIT LIMITED.....OBJECTOR

RULING

1. The application before me is by the Objector, **DREAM CREDIT LIMITED**.
2. The objector asked the court to issue an injunction to stop the Decree-Holder, **MALHA ALI SHEIKH**, from selling off the attached vehicle until the application was heard and determined.
3. The vehicle which was attached is a **TOYOTA WISH**, Registration No. **KBX 269P**.
4. The second relief which the objector asked for is the annulment of the **PROCLAMATION NOTICE** dated 28th January 2016.
5. As an alternative to the quest for an injunction, the objector asked the court to stay further execution of the Decree until the application herein was determined.
6. It is the objector's case that the vehicle in issue was owned jointly by the Objector and the 1st Judgement-Debtor, **ARVIND KASHMIRILAL BHUTIYANI**. Therefore, because the vehicle did not belong exclusively to the Judgement-Debtor, the objector believes that it was wrong for the Decree-Holder to have it attached and sold, in execution of the Decree.
7. If the court did not stop the execution of the Decree, through the sale of the attached vehicle, the objector says that it would suffer irreparable loss.
8. In answer to the application, the Decree-Holder did not file any Replying Affidavit. As far as Mr. Sevany, the learned advocate for the Decree-holder was concerned, there was no need for a Replying Affidavit.
9. But Miss Nyabuto, the learned advocate for the objector, submitted that because there was no Replying Affidavit, the court should deem the application as unchallenged.
10. The Decree-Holder's first response to that contention was that it would have been unrealistic to expect it to file a Replying Affidavit, when the application was only served on the afternoon preceding the hearing of the said application.
11. Secondly, and in any event, the Decree-Holder expressed the view that it would be relying on the facts presented by the objector, to answer to the application. In other words, the Decree-Holder

- believed that there was no need for it to have filed a Replying Affidavit, before it could answer the application.
12. In my considered opinion, when a respondent to an application is served at a time which gives him little or no opportunity to put together a Replying Affidavit prior to the hearing of an application, the respondent should ask the court for more time, to enable him file and serve a Replying Affidavit, where it is considered necessary.
 13. When the respondent makes a choice to proceed with the application before he had filed a Replying Affidavit, he cannot then complain that he had little or no time to file an appropriate Replying Affidavit.
 14. When a respondent fails to respond to matters of fact, as spelt out in the applicant's supporting affidavit, the court will be entitled to make the presumption that the facts were uncontroverted.
 15. In this case the objector says that the vehicle in issue was registered in the joint names of the Judgement-Debtor and the objector. As the respondent does not challenge that fact, it is presumed to be factually accurate.
 16. In the case of **DR. MICHAEL KWENA Vs. RAZA PROPERTIES LIMITED & ANOTHER, Hccc No. 1914 of 2000** Nambuye J. (as she then was) discussed a number of other cases in which there had been objection proceedings. This is what the court said;

“There is the case of SERINGA JILL BIRGIT GOTKE Vs SETTLEMENT FUND TRUSTEES [1966] E.A 462 where the owner of the aircraft transferred the aircraft free of charge to the wife on 14/8/65 and then left the country on 16/8/65. The suit was filed on 28/8/65 simultaneously with an application for attachment before judgement, which order was issued on 30/8/65. Objection to attachments was commenced and upon hearing of the same, the court ruled, inter alia, that the purpose for the transfer of the aircraft was to put the available asset out of the reach of the defendant, should they succeed in their claim against G.

The above decision was based on the grounds that on the basis of the evidence before the court, G was aware of the impending proceedings against him and it was believed that that is why he transferred the valuable asset to his wife. On that account, the court upheld the attachment”.

17. Hon. Lady Justice Nambuye went on to address another authority, as follows;

“In the case of GEORGE G. KUBU MBUTHIA Vs PETER NJERU MUGO & 3 OTHERS Hccc No. 1260 of 2002, Kasango J. refused to uphold a transfer of attached property because the attachment was completed on 23rd November 2004 whereas the changes were effected on 24th November 2004”.

18. Clearly, therefore, when an attachment was held to have been regular; and if it was completed before the transfer of the attached goods, the court would uphold the attachment, and would refuse to uphold or to sanction the transfer.
19. I have given due consideration to the decision of Kasango J. in the case of **GEORGE GIKUBU MBUTHIA Vs PETER NJERU MUGO & 3 OTHERS** (above). One of the points covered by the decision was in relation to the inclusion of the Court Broker in the objector's application. Although the parties before me did not canvass any issue touching on the auctioneer, I deem it necessary to restate what my learned sister said in her decision, which is as follows;

“At the beginning, I would like to point out that the joining of the auctioneers in these proceedings, without the leave of the court, is both misconceived and fatal. The objector ought to have moved this court to join a party before inserting their names in these proceedings”.

20. That settles the application as it relates to the Court Broker in this case.

21. Meanwhile, in **SERINGA JILL BIRGIT GOTKE Vs SETTLEMENT FUND TRUSTEES**

- [1966] E.A 472, Farell J. dismissed the objection proceedings and upheld the attachment, even though the aircraft had already been transferred to the name of Seringa, who was the wife to Gotke. In effect, the transfer of the aircraft by Gotke, to his wife Seringa did not defeat the attachment.
22. In **MIEMA ENTERPRISES LTD Vs NJOKA TANNERS LTD [2007]** e KLR Warsame J. (as he then was) noted as follows;
- “I am satisfied beyond doubt that the goods attached are the property of the Defendant disguised in a manner to defeat the claim of the plaintiff. It is my decision that the objection is based on distortion, deceit and deception with a view to obstruct the cause of justice. This court has the eyes, mind and ears to see through that deceit and deception”.***
23. And in the case of **CHART ENGINEERING ENTERPRISES LTD Vs. ATTRACTING SUPPLIES LTD [2009]** e KLR Koome J. (as she then was), noted that the objection proceedings were meant to use statute to defraud creditors. The learned Judge said;
- “Mr. Geoffrey Githuka has used the objector where he is also a director, to cause confusion, run away from responsibility of paying the creditors using the Companies Act as an instrument to commit fraud”.***
24. The point that permeates right through those cases, is that the court must remain extra vigilant, in order to safeguard the interests of justice. Where the court is satisfied that the objection proceedings were an instrument calculated to defeat the legitimate rights of a Decree-Holder, the court will not lend any support to the objector.
25. In this case, there is no dispute at all concerning the sequence of events giving rise to the application.
26. First, the vehicle in issue was proclaimed, in the process of the execution of the Decree. The proclamation took place on 28th January 2016.
27. The objector said that on 30th January 2016, the Judgement-Debtor applied for a loan of Kshs. 400,000/- from the objector. The Judgement-Debtor provided the vehicle in issue as the security and collateral for the loan which the objector gave to him.
28. According to the objector, the vehicle was registered in the joint names of the Judgement-Debtor and the objector, on 21st March 2016.
29. In effect, by the date when the Judgement-Debtor was offering the vehicle as a security to the objector, the said vehicle had already been proclaimed by the Court Broker.
30. In the case of **DAVIS & SHIRTCLIFF LTD Vs ATTORNEY GENERAL CIVIL APPEAL No. 21 of 1978**, the Court of Appeal made it very clear that when a Court Broker was carrying out his functions, he was doing so in his capacity as an agent of the court.
31. Pursuant to Rule 14 of the Auctioneers Rules;
- “No person shall remove, alter, damage, substitute or alienate any goods comprised in the proclamation until they are redeemed by payment in full of the amount in court....”***
32. In my understanding, therefore, when a Court Broker had proclaimed goods, the said goods are placed firmly in the hands of the court.
33. The goods that had been so attached could only be redeemed by payment of the outstanding decretal amount or of such lesser sum as the Decree-Holder would, in writing, confirm as being acceptable in settlement of the Decree.
34. It would therefore follow that the Judgement-Debtor, when he offered the vehicle as security and collateral for the loan he was borrowing from the objector, was acting unlawfully. He was purporting to take the vehicle from the hands of the court, and alienating it, by offering it as a security and collateral.
35. The Judgement-Debtor did not have the permission of the court to use the vehicle as security.
36. He was well aware that the vehicle had already been attached in the process of the execution of

- the Decree.
- 37.His action can only be deemed to have been a deliberate attempt to obstruct or to subvert the course of justice.
 - 38.The execution process has not been challenged by the Judgement-Debtor. It is thus deemed to have been lawful in every respect. Therefore any attempt to obstruct or to subvert the lawful process of execution cannot be countenanced by the court.
 - 39.I find that the Judgement-Debtor tendered the vehicle as security when he lacked the requisite authority to do so.
 - 40.Therefore, the objector to whom the vehicle was offered cannot have acquired any better entitlement to the vehicle than what the Judgement-Debtor had.
 - 41.The transfer of ownership from the Judgement-Debtor to the objector jointly with the Judgement-Debtor was voidable. It is certainly a step which the court cannot sanction. I so find because if the transfer were to be accepted by the court as having been legitimate, it would imply that the court had assisted the Judgement-Debtor to defeat the lawful process of the execution of the Decree.
 - 42.The court cannot shoot itself in the foot, by appointing its agent to execute a Decree which was issued by the court, and then give approval to an exercise calculated by the Judgement-Debtor to scuttle the process being undertaken by the Court Broker.
 - 43.If Judgement-Debtors were allowed to remove goods which had been attached, to offer them as security to other parties or to otherwise alienate or encumber them, so as to defeat the execution process, that would be absolutely revolting.
 - 44.This court refuses to be used by the objector to sanction the actions of the Judgement-Debtor, which would cause an obstruction to the process of execution.
 - 45.I therefore find that even if the logbook continues to reflect the objector and the Judgement-Debtor as the registered owners of the vehicle, their rights cannot supercede the proclamation.
 - 46.The situation may be compared to one in which a piece of land is offered as a security to a second lender, when the loan borrowed from the first lender was still outstanding.
 - 47.If the second lender wished to realize the security, it would have to undertake to apply the proceeds, first, to pay-off the first lender.
 - 48.In this case, I direct that until and unless the decretal amount payable to the Decree-Holder was paid in full, the objector and the Judgement-Debtor shall not have any legal authority to transfer the vehicle to either of them or to any other person.
 - 49.Therefore, even if the Judgement-Debtor failed to service the loan facility granted by the objector, and the objector had to sell-off the vehicle, the proceeds realized would first have to be applied towards the settlement of the decretal amount. In other words, the attachment ranks in priority over the transfer to the objector.
 - 50.Accordingly, the court upholds the attachment, as it is lawful.
 - 51.The objector will pay to the Decree-Holder, the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Miss Kalsi for Sevany for the Plaintiff

No appearance for the 1st Defendant/Judgement Debtor

No appearance for the 2nd Defendant/Judgement Debtor

Miss Nyabuto for Objector

Collins Odhiambo – Court clerk.

