



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 66 OF 2005**

**ASHARAF A. DADAR. .... APPELLANT**

**VERSUS**

**KAVOI MUINDE (*Suing As Personal Representative***

***Of Boniface Kyalo Kavoi*). .... RESPONDENT**

***(Being an Appeal Arising from the Ruling of Hon. Principal Magistrate Miss Maina Delivered on 16<sup>th</sup> February, 2005 at Chief Magistrate's Court in Nairobi CMCC No. 3238 of 2004).***

**J U D G M E N T**

The appeal herein arises from a ruling by E N Maina, Miss (as she then was) delivered on the 16<sup>th</sup> day of February, 2005 in which she dismissed the application dated 12<sup>th</sup> October, 2004.

The said application which was brought under Order XXI Rule 57 of the Civil Procedure Rules (then) sought among other orders that a declaration be issued that the proclamation and intended attachment of the objector's property is null and void. It also sought orders that the cost of the application be borne by the Plaintiff/Decree Holder.

The application was premised on the grounds that the Objector/Appellant was never a party to the suit before the trial court, that his goods had been proclaimed by Auctioneers M/s Kiiriyu Merchants, the objector is the indefeasible owner of all the property that appears in the proclamation and that the intended sale is defective as the Respondent/Decree Holder has no interest in law to entitle him to dispose off or in any way interfere with the Appellant's property. The proclamation is annexed to the affidavit of the Ashraf A. Dadar who was the objector in the lower court but the Appellant in this appeal and in it, the properties listed in the said proclamation are motor vehicle registration Number KAD 216Z (Pick Up) and assorted household goods.

The Appellant claims ownership of the motor vehicle and the household goods and has annexed a copy of the log book and a sale agreement. As evidence of ownership with regard to the household goods he has annexed a copy of tenancy agreement for the year 2003 and 2004.

The application was opposed vide a replying affidavit sworn by Kavoi Muinde, the Respondent in this appeal on the 19<sup>th</sup> day of November, 2004.

The Replying affidavit deals with these main issues.

1. That the chamber summons dated 13<sup>th</sup> October, 2004 was filed outside the time provided for

under order XX1 Rule 56 (then).

2. That the objector has not supported his claim of ownership of the proclaimed property.

The first issue was dealt with, by way of an objection before the trial court and it was dismissed with costs and it is, therefore, not a subject in this appeal.

On the issue of ownership, the learned magistrate found that the objector/appellant did not proof his claim and consequently dismissed the application hence the appeal herein.

The Appellant has approached this court by way of a memorandum of appeal which was filed on 17<sup>th</sup> February, 2005 and has listed the following grounds of appeal.

1. The learned trial magistrate erred in law and fact by failing to appreciate that the objector/appellant had a legal and equitable interest in the goods proclaimed by the decree holder.
2. The learned trial magistrate erred in fact and law in failing to appreciate that the judgment debtor is a limited liability company and thus a different legal entity from the Objector/the Appellant.
3. The learned trial magistrate erred in law and fact in finding the objector's application unmeritorious while the decree holder failed to prove that the proclaimed property belonged to the judgment debtor.
4. The learned trial magistrate erred in law and fact in making no finding at all as to the owner of the other goods proclaimed apart from motor vehicle a registration No. KAD 216Z which in any event is not registered in the name of the defendant.
5. The learned trial magistrate erred in law and fact in failing to appreciate that the decree holder was not privy to the contract between the Appellant and one Mr. Henry Gordon Otieno and thus couldn't claim to rescind or challenge the contents of the agreement.
6. The learned trial magistrate erred in law and in fact in making a finding that there was no rebuttal of evidence that the transfer of Motor vehicle Registration No. KAD 216Z yet further denied to allow the objection proceedings.
7. The learned trail magistrate erred in law and fact in dismissing the objector (Appellant) application with costs to the Plaintiff/Respondent.
8. The learned trial magistrate erred in law and fact in failing to appreciate that Motor Vehicle Reg. No. KAD 216Z was in possession of the objector and the only person who could claim better title to the motor vehicle was Mr. Fred V. Okumu.
9. The learned trial magistrate erred in law and fact in failing to appreciate that to allow the execution to proceed was to allow execution to issue against a person who is not a party to the suit.
10. That the learned trial magistrate erred in principle in failing to appreciate that with all the doubts raised as to ownership of the proclaimed goods the decree holder had not satisfied on a balance of probabilities that the goods were indeed owned by the judgment debtor.

Parties agreed to dispose off the appeal by way of written submissions which they highlighted on the 11<sup>th</sup> November, 2015. In its submissions, the learned counsel for the appellant submitted that the Defendant/Judgment Debtor in Nairobi CMCC No. 3228 of 2002 was a limited liability company which is a separate legal entity from the appellant herein who was the objector in the lower court. This is by dint of the application of the doctrine of "corporate personality" and to this end he relied on the case of **Salomon Vs Salomon (1897) AC**. He quoted the words of Lord MC Naughton in the said case as hereunder: -

***"The company is at law a different person altogether from the subscribers and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the hands receive the profits, the company is not in law the agent of the subscribers or trustee for them nor are the subscribers as members liable in any shape or form except to the extent and manner prescribed by the Act...."***

He submitted that even assuming that the Respondent/Decree Holder relied on the concept of "lifting the Corporate veil", there was no admissible exceptional circumstances to warrant the court to disregard and

lift the corporate entity and find the directors personally liable and hence attach their property in settlement of the judgment debt.

The second limb of submissions was on whether the Appellant has legal and equitable rights over the proclaimed goods and with regard to this, he relied on the log book and the tenancy agreement of the premises where the household items were proclaimed and argued that, in her ruling, the learned magistrate noted and agreed with the counsel of the objector that a log book is only prima facie evidence of ownership and that the same can be rebutted, that there was no evidence to show that the present ownership of the motor vehicle passed to the objector and that no evidence of money agreed upon was ever paid to the seller nor duly executed transfer form exhibited.

He further submitted that from the learned magistrate's observation that, the motor vehicle is to date (as at that date) registered in the name of the seller, she ought not to have found the chamber summons unmeritorious because the vehicle is clearly not registered in the name of the judgment debtor but in the name of a 3<sup>rd</sup> party one Mr. Fredrick Okumu who is not party to the suit.

Counsel for the Appellant contended that by a sale agreement dated 17<sup>th</sup> June, 1996 and a log book handed over to the Appellant/objector by the seller Mr. Henry Gordon Otieno and Monies duly paid to the seller it can then be established that on a balance of probabilities the Appellant/Objector has exhibited that the said motor vehicle at the time was beneficially owned by him and should not be the subject of attachment by the Respondent/Decree Holder. According to him, it will also follow that by a tenancy agreement adduced before the trial court, the premises were occupied by the Appellant/Objector and not by Defendant/Judgment Debtor and therefore the household items proclaimed are not subject to attachment by the decree holder.

On who should be liable to pay the costs of the objection proceedings; it was his submission that the auctioneer should be liable as he was under a duty in law to investigate the ownership of the property before execution could be levied.

Lastly the learned counsel for the Appellant took issue with the learned magistrate for her failure to make a finding on ownership of the other properties listed in the proclamation. He relied on the case of **Electro Watts Limited Vs Countryside Suppliers Limited & Another** HCCC No. 728 of 2000 and that of **Patrick Kingori Warugongo Vs James Nderitu & Another**, Civil Appeal No. 93 of 2009. He urged the court to allow the appeal.

On his part, the Respondent submitted that the Appellant has not proved on a balance of probability that he has any legal or equitable interest in any of the goods attached in execution of the decree. That the premises where the goods were attached are the same premises where the judgment debtor was conducting its transport business with its assets and properties stored therein.

The learned counsel for the Respondent further submitted that, the purported tenancy agreement expired on 30<sup>th</sup> June, 2004 long before the objection proceedings were filed. According to her, the tenancy agreement is not admissible under the provisions of the Stamp Duty Act and that the Applicant was not a tenant in the premises but holding the judgment debtors properties as an interested party.

She averred that the Appellant has not proved any ownership rights over the motor vehicle registration number KAD 216Z and no evidence was produced of consideration if any, paid by the Applicant to the purported owner. She concluded by submitting that the Applicant who has an interest in the judgment debtor made arrangements to have the documents drawn purporting that the attached goods belong to the Appellant with the sole intention of scuttling the execution and to defeat justice. She relied on the case of **TM – AM Construction Group (Africa) Vs Tumac Engineering Services & Another (2007)** Civil Case No. 540 of 2004 and that of **Karanja Kahia Vs Kenya Times Media Trust Ltd (2006)** eKLR. She urged the court to dismiss the appeal.

I have carefully considered the materials before me and the submissions by the learned counsels for the respective parties. I will deal with the three issues set out by the counsel for the Appellant which

essentially covers all the grounds of appeal.

- i. Is the Appellant/Objector a separate legal entity from the defendant/judgment debtor?
- ii. Does the Appellant/Objector have legal and equitable interest over the proclaimed goods?
- iii. Who should bear the costs of the objection proceedings and the partial execution?

Regarding the first issue, there is no material before the court to show that the Appellant was either a director or a subscriber of the judgment debtor. The legal principle in **Salomon Vs Salomon** only applies in a case where the execution is levied against the director of a company in a case where judgment has been entered against the company itself. In fact, going by the record, the Appellant has absolutely no business to do with the judgment debtor as he has not bothered to establish any link between the two of them. I need not go further in dealing with this issue.

On the second issue, as to whether he has any legal or equitable interest in the proclaimed goods, I have looked at the annexed log book and it is noted that the registered owner of motor vehicle KAD 210Z is one Fred V Okumu.

The Appellant herein claims ownership of the said vehicle by virtue of agreement of sale annexed to the affidavit and dated 17<sup>th</sup> June, 1996. The said agreement is between Henry Gordon Otieno and the Ashraf Abdulhamid Dadar the Appellant herein. The Appellant has not established any link between the registered owner of the vehicle and Henry Gordon Otieno who purportedly sold the vehicle to him. This, therefore, means that the seller did not have any legal or equitable interest in the said motor vehicle which he was capable of passing to the Appellant. Secondly, there is no evidence that there is consideration that passed between the seller and buyer of the said vehicle. The Appellant ought to have annexed evidence by way of a receipt or any form of acknowledgement to show that indeed the purchase price was paid to the seller and that the possession of the vehicle was eventually given to him. As rightly noted by the learned magistrate, there is no transfer form that has been annexed to show that indeed the vehicle was transferred to the appellant. In fact, as appreciated by the Appellant in ground 8 of the Memorandum of Appeal, the only person who could claim title to the motor vehicle is the registered owner Fred V Okumu and for that reason he ought to have been the objector and not the Appellant herein.

On ground 4 of the Memorandum of Appeal, it's true that the learned magistrate failed to make a finding on whether the Appellant proved his legal or equitable interest on the other properties listed in the proclamation. This must have been an omission on her part. I will proceed to consider that aspect and in so doing I note that the Appellant relied on a tenancy agreement dated 17<sup>th</sup> July, 2003 between the landlord Amirtlal M Malde and himself as the tenant.

According to it, the tenancy term was eleven months fixed from 1<sup>st</sup> day of August 2003 to 30<sup>th</sup> June, 2004. The evidence available is that the goods were proclaimed on 21<sup>st</sup> September, 2004. Going by the tenancy agreement, the tenancy term expired in the month of June 2004 and therefore, by the time the auctioneer proclaimed the goods, there was no landlord/tenant relationship between the appellant and the landlord and having provided to the court no other evidence to the contrary, he was legally "*speaking*" not a tenant in the premises known as Plot No. L.R. 209/2779/3 flat No. 2 in which the proclaimed goods were found.

Even assuming that this court was to give him the benefit of doubt and find that he was in occupation of the premises at the material time, he has not exhibited any evidence that the proclaimed household goods belong to him. He ought to have annexed receipts that he obtained upon purchase of the goods or any other form of evidence of ownership. In his own submissions, the counsel for the Appellant has appreciated this fact by quoting the case of **Dubai Bank (K) Ltd Vs Come-Cons Africa Ltd and Impak Holdings Co. Ltd** that the onus of proof in objection proceedings is on the objector to establish ownership. It is unfortunate that the Appellant was unable to proof any legal or equitable interest in all the properties listed in the proclamation dated 21<sup>st</sup> September, 2004. Unfortunately, this is the furthest the court can go in establishing ownership of the said goods.

Having dealt exhaustively with the other two issues it should at this juncture, be apparently clear as to who should be liable to pay the costs of the objection proceedings and the auctioneers charges. No doubt, it should be the objector/Appellant. In the upshot, I find no reason to interfere with the finding by the learned magistrate and I do uphold her decision. The appeal herein is dismissed with costs to the Respondent.

Dated, signed and delivered in Nairobi this 9<sup>th</sup> day of June, 2016.

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellant***

..... ***for the Respondent***