



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 94 OF 2014

DIANI ENTERTAINMENT LTD. T/A TANDOORI BAY.....PLAINTIFF

VERSUS

PAWAN KUMAR GUPTADEFENDANT

AND

ESS PEE ESS INVESTMENT LTD.OBJECTOR

RULING

1. The application before me is dated 29th April, 2016. It seeks orders to the effect that:-

(i) This Court be pleased to raise the attachment of Motor vehicle Registration No. KBB 333D Nissan Saloon which was attached by Kinyua Auctioneers in execution of the Judgment entered on the 18th August, 2014.

(ii) Ms Kinyua Auctioneers be condemned to pay the costs of the storage; and

(iii) Costs of the application.

2. The application was based on the grounds that:-

a. The attached motor vehicle belongs to the Objector and not to the defendant;

b. The attachment was effected without valid warrants;

c. The Objector is not a party to this suit and there is no Judgment against it thus cannot be called upon to make good of the Judgment on record;

d. The Objector shall suffer immense prejudice and great financial loss if the attachment is not raised by this court.

3. The application was brought under Order 22, rules 51 and 52 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and other enabling provisions of the law. It was supported by the affidavit of Sharda Gupta dated 5th May, 2016. Although Mr. Kithi for the Plaintiff was present in Court at the time of the hearing of the application, he said nothing in response to the same.

His proposal was that the application be served on Kinyua Auctioneers.

THE APPLICANT'S SUBMISSIONS

4. Mr. Khatib, Learned Counsel for the applicant submitted that his application dated 29th April, 2016 seeks orders for release of Motor vehicle registration No. KBB 333D which was attached by Kinyua Auctioneers, to the Objector, ESS PEE ESS Investment Limited.

5. It was submitted that the Objector is not a party to the suit and is in no way involved in this case. He added that the Auctioneer was duly informed of the illegal attachment but has not released the vehicle. Mr. Khatib prays that the application be allowed with costs.

ANALYSIS AND DETERMINATION

The issue that calls for determination is if the attachment of motor vehicle KBB 333D was valid.

6. A perusal of the Court record reveals that the Objector was at one time the 2nd defendant in this case. A request for Judgment was filed on 13th August, 2014 and an ex parte Judgment was entered against the 1st defendant on 18th August, 2014. A notice of withdrawal of the suit against the 2nd defendant, now Objector, was filed by the law firm of Steve Kithi & Company Advocates on 22nd September, 2014.

7. A decree was issued against the 1st defendant Pawan Kumar Gupta on 22nd November, 2014. A warrant of sale of property in execution of decree for money was issued by the Deputy Registrar on 16th December, 2014 and a warrant of attachment was issued on the same day to Kinyua & Company Auctioneers.

8. In a Notice of proclamation for attachment in the Court file dated 18th December, 2014, Motor vehicle Registration No. KBB 888Z is listed as one of the goods in the schedule of proclaimed movable property. The deponent's affidavit does not disclose when the motor vehicle the subject of this application was attached all that is indicated in paragraph 3 of the affidavit is that "*Kinyua Auctioneers have attached motor vehicle registration No. KBB 333D Nissan Salon under instructions from the plaintiff and in execution of the Judgment issued on 18th August, 2014.*"

9. In paragraph 4 thereof, the deponent avers that the motor vehicle belongs to it and a copy of the log book is attached to the affidavit. Paragraphs 5 and 6 of the affidavit indicate that the Objector is not a party to this suit thus rendering the attachment illegal and that the Auctioneer had no valid warrants.

10. The deponent in paragraph 7 of the affidavit asserts that if the attachment is not raised by this court, the Objector shall suffer great financial loss as the Auctioneer shall move ahead to sell the Objector's motor vehicle. The applicant prays for the application to be allowed with Costs.

11. The Court notes that the Objector issued a notice of objection on 10th May, 2016 to the law firm on record for the plaintiff and to Kinyua Auctioneers in accordance with Order 22 rule 51 of the Civil Procedure Rules.

12. The plaintiff did not reply to the Objector within the 7 days prescribed in the notice of objection or intimate to the Court in writing and to the Objector that he does not propose to proceed with the execution of the attachment. This Court therefore under the provisions of Order 22 rule 53 has the powers to make an order raising the attachment.

13. A copy of the log book attached to the Objector's affidavit shows that the Motor Vehicle attached legally belongs to the Objector who is not a party to this suit. The said Motor Vehicle was registered in the Objector's name in the year 2008, long before the suit herein was instituted. The Objector has shown it is entitled to the orders sought.

14. I therefore make the following orders:-

- (i) The attachment herein by the plaintiff/attaching Creditor is herewith raised forthwith;
- (ii) The Auctioneer's Costs will be paid by the plaintiff/attaching Creditor; and
- (iii) The Costs of the objection proceedings will be met by the plaintiff/attaching Creditor.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of July, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the objector

No appearance for the plaintiff/attaching Creditor

No appearance for the defendant/Judgment debtor

Rose Echor Court Assistant