



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 282 OF 2011

WAKI KENYA LIMITED.....PLAINTIFF

- VERSUS -

KITAYAMA CONSTRUCTION LIMITED.....1ST DEFENDANT

MARWA KEMERO MAISORI.....2ND DEFENDANT

JENNIFER AKOMO SAISORI.....3RD DEFENDANT

CONSOLIDATED BANK LIMITED.....OBJECTOR

RULING

1. The application before me was brought by **CONSOLIDATED BANK LIMITED**, in its capacity as an Objector to the attachment by a Court Broker, **SSEBO INTEL COMPANY AUCTIONEERS**.
2. The applicant lays claim to a motor vehicle Registration Number **KCC 995 N**, a **TATA TIPPER**.
3. It is the objector's case that the vehicle in issue was not capable of being lawfully attached in relation to a debt owed by the 1st Defendant, **KITAYAMA CONSTRUCTION LIMITED**, because the objector has a legal interest in it.
4. The objector has produced a copy of a Loan Agreement dated 19th February 2015, between the objector and **KITAYAMA CONSTRUCTION LIMITED** (*hereinafter*, "**Kitayama**").
5. Pursuant to the Loan Agreement, the objector loaned Kshs. 4,720,000/- to Kitayama, for the purchase of the vehicle in issue.
6. The objector has also produced a copy of the logbook which shows that the vehicle was owned by both the objector and Kitayama.
7. The third piece of evidence produced by the objector was a statement of Kitayama's bank account at Consolidated Bank Limited, Harambee Branch. A reading of the bank statement shows that as at 14th March 2016, Kitayama still owed Kshs. 4,059,020.36.
8. The fourth piece of evidence made available by the objector was a fixed Debenture dated 18th May

2015. Pursuant to the debenture, the objector had a first and fixed charge over the vehicle, and Kitayama had no authority to dispose of the vehicle or to alienate it without the consent of the objector.

9. By virtue of the loan agreement, the debenture and the logbook, the objector submitted that it has a legal and equitable claim of ownership of the attached vehicle.

10. And as the objector was neither a party to the suit herein nor a debtor to the plaintiff, it submitted that the vehicle belonging to it, cannot be lawfully attached.

11. However, the plaintiff submitted that the vehicle was available for attachment, in the process of executing the Decree in this case.

12. The plaintiff relied on the provisions of Section 44 (1) of the Civil Procedure Act, as the foundation upon which the right to attach the vehicle was based. The said section reads as follows;

“All property belonging to a judgement debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree”.

13. In this case the plaintiff has not demonstrated that the judgement debtor had power to dispose of either the vehicle or of the profits emanating from the use of that vehicle.

14. The vehicle is registered in the joint names of the objector and the judgement debtor, and it is subject to the fixed debenture in favour of the objector. Therefore, until and unless the debenture was discharged, the vehicle could not be disposed of by the judgement debtor.

15. A charge registered in respect to a property does not give rise to an exemption from attachment of the said property, in the same manner as provided for by section 44 (1) of the Civil Procedure Act. The charge ranks in priority over the claims by either the chargor or by third parties.

16. Accordingly, the vehicle was not available for attachment.

17. The plaintiff submitted that the interests of each party was capable of severance, since the interests of the objector was specific and distinct.

18. I am afraid that I cannot understand how the interests in the single vehicle could be deemed to be specific and distinct. I say so because the fixed debenture is in relation to the whole vehicle.

19. The plaintiff suggested that the vehicle should be sold off, so that the objector recovers the money due to it, leaving the balance to the plaintiff.

20. Of course, from a practical perspective, if all the parties were to be in agreement, the plaintiff's suggestion could offer a solution. However, such a solution cannot be one in furtherance of the execution process. It could only be achieved through a negotiation, freely entered into by the parties concerned.

21. Neither the plaintiff nor the court could compel the objector to agree to the proposal for a negotiated settlement.

22. The plaintiff also sought reliance on Section 50 (1) of the Civil Procedure Act, which provides as follows;

“Where assets are held by any court and more persons than one have before the receipt of such assets by such court lodged applications in court for the execution of decree for the payment of money issued against the same judgement – debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be distributed amongst the decree –

holders in accordance with the priorities of the lodging of their several applications:

Provided that, where any property is sold subject to a mortgage or charge, the mortgagee or encumbrances shall not be entitled to share any surplus arising from the sale”.

23. It was the understanding of the plaintiff that that section contemplated a situation where a charged or mortgaged property would be sold to satisfy a judgement debt.

24. In my understanding, Section 50 (1) of the Civil Procedure Act deals with scenarios in which two or more persons have a decree against one judgement – debtor. If the decree – holders carried out execution by attachment of the same asset, the said decree – holders would be entitled to share the proceeds of the sale of the attached assets.

25. Such a situation is absent from this case, as the objector is not laying claim to vehicle through the process of attachment. The objector is a registered co-owner of the vehicle, and it holds a fixed debenture over the said vehicle. By virtue of the fixed debenture and also by reason of being a co-owner of the vehicle, the objector does not rank *pari pasu* with the decree – holder who wishes to attach the vehicle in issue. The objector’s rights rank in priority over the claim by the decree – holder.

26. The only way that the plaintiff could lawfully proceed with the execution herein would be by first paying-off the balance of the loan owed by Kitayama. After the loan was paid - off, the objector would be obliged to discharge the security, rendering the vehicle attachable.

27. A registered legal charge cannot, in my considered opinion, be described as a deliberate attempt to deprive decree – holders of the right to attach the goods which were the subject matter of such charge. Legal charges were a well recognized instrument through which the chargees were provided with a legitimate assurance that if the chargor failed to meet their obligations, the chargee would become entitled to realize the security in priority over other creditors.

28. Through the fixed debenture and the log book, the objector has demonstrated both a legal and equitable interest in the vehicle. Therefore, the objection is well founded. It is sustained.

29. Accordingly, the attachment of the vehicle is lifted forthwith.

30. The plaintiff will pay to the objector, the costs of the application. The plaintiff is also ordered to pay the costs incurred by the Court Broker in the process of the attachment in issue.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mulindi for Mrs Matata for the Plaintiff

No appearance for 1st the Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

Miss Otieno for the Objector

Collins Odhiambo – Court clerk.