



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 163 OF 2013

SISO LIMITED.....PLAINTIFF

VERSUS

CAROLINE WANJIHIA T/A

C.W. WANJIHIA & CO. ADVOCATES..... DEFENDANT

KIMUTHIA MACHARIA WANJIHIA..... OBJECTOR

RULING

INTRODUCTION

1. Vide a **Notice of Motion** application dated **29th December 2014** and filed in court on 31st December 2014 by the Objector, the Objector objected to the Proclamation and attachment of the suit properties and sought a stay of execution of the decree on the grounds that the proclaimed properties did not belong to the Attaching Creditor but to the Objector.
2. The application was filed pursuant to Order 22 Rules 51 and 52 of the Civil Procedure Rules. The matter came to court on 14/01/2015, and although Mr. Kassam for the Attaching Creditor was in court, the matter was treated as being in court *ex-parte*, and the court allowed Mr. Gaturu to proceed with the matter *ex-parte*. *Ex-parte* temporary orders were given and the Attaching Creditor was required under Order 22 Rule 51 to intimate to the court whether or not they would be proceeding with the said attachment the said stay order notwithstanding. Rule 53 states:-

“Should the attaching creditor in pursuant of a notice issued under Rule 52 fail to reply to the court and the Objector . . . that he does not propose to proceed with the execution . . . , the court shall make an order raising the attachment . . . and shall make such order as to costs as it shall deem fit.”

3. The Attaching Creditor’s counsel M/s Oyugi has not denied being served with the Application and the Notice under Rule 51. In fact the same was served and was received by both the auctioneers and the Attaching Creditor on 16th January 2015. However, there is no response from the Attaching Creditor required under Rule 52. In other words, the Attaching Creditor has not intimated to this court or to the Objector in writing within the time required whether it proposes to proceed with the attachment and execution thereof.
4. Mr. Gaturu counsel for the Objector has submitted that such failure is fatal to any defence which the Attaching Creditor may mount to the objection proceedings and that the requirement under Rule 52 is couched in mandatory terms. Even under Rule 53, the court has no option where there

is a failure to comply with Rule 52. Mr. Gaturu then submitted that the only option for this court is to raise the proclamation and attachment and award costs. M/s Oyugi had little to say except that they had filed a replying affidavit and were ready to proceed with the application.

5. I have carefully considered the application by Mr. Gaturu to raise the attachment. The requirement under Order 22 Rule 52 is mandatory. The Attaching Creditor has no option but to intimate in writing whether he intends to proceed with attachment and execution. If he intends to do that, such notice will be accompanied by a replying affidavit under Rule 54, and the court will give directions for the hearing of the application. If however, the attaching creditor fails to give information in writing, under the above stated Rule 53, the court has no option but to raise the attachment and give direction on costs. This is what appears to have happened in this particular matter.
6. It is important to give a brief background to Objection Proceedings under Order 22 Rules 51 to 54.
7. Both the Attaching Creditor and the Objector have obligations to perform under those rules, and those obligations are mandatory. To set the record straight it must be observed that under the old Civil Procedure Rules, objection proceedings were commenced by the Objector through a notice in writing to the court and to all other parties and to the decree-holder of his objection, to the attachment. This notice was necessary because an objector is never a party to the suit, and this notice provided, and still provides, an objector with the *locus standi* in suit. In the new rules there is now also an application and a supporting affidavit to accompany such a notice. Rule 51 states:-

(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."

8. From the foregoing, it seems to me that the Objector is mandated to give notice in writing, to the court and to other parties, of his objection to the attachment. Such notice in writing is quite apart from the application and supporting affidavit. Rule 52 now emphasises about the validity of such a notice. It states:-

(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."

9. It is only after the objector has himself given the said notice, and the Attaching Creditor has failed to comply, that Rule 53 comes into operation. Rule 52 speaks of a valid notice and application being received by court. This implies that an application by an Objector which is not supported by a valid notice is not properly before the court. The court can only order stay of execution for not more than fourteen days upon receipt of a valid notice and application. What this means is that an objector's application which does not give a valid notice required under Rule 51 is not validly before the court. It is thus clear that the requirement for notice starts with the Objector under Rule 51, and the attaching creditor is required to issue a notice of his intention pursuant to Rule 52. Under Rule 53, the court has no option but to raise the attachment if the attaching creditor fails to issue notice under Rule 52. It is important to note that even where the attaching creditor intends to proceed with attachment he must still say so in writing while at the same time filing his replying affidavit.
10. Having set out the record to those rules, it is clear to me that the Attaching Creditor has not complied with Rule 52 despite having received the Notice under Rule 51. This being so, this court has little option under Rule 53, except to uphold the Objection by Mr. Gaturu in the following terms:-
 - a. ***The proclamation and attachment herein by the Attaching Creditor is herewith raised with immediate effect.***

- b. *The Attaching Creditor shall pay the auctioneers cost, if any.*
- c. *The costs of these Objection Proceedings shall be for the Objector.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kandere holding brief for M/s Oyugi for Plaintiffs

Mr. Gaturu for Objector

No appearance for Defendant

Teresia – Court Clerk