



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 176 OF 2006

KAIMOSI TEA ESTATE LIMITED.....PLAINTIFF

VERSUS

COUNTRY MOTORS LIMITED.....DEFENDANT

AND

KICOMI 1993 LIMITED.....OBJECTOR

RULING

INTRODUCTION

1. The Objector's Chamber Summons dated 2nd February 2010 and filed on 4th February 2010 was brought under the provisions of Order XXI Rules 56 and 57 of the former Civil Procedure Rules (now replaced by Order 22 Rule 54 of the Civil Procedure Rules, 2010). It sought for orders **THAT:-**
 1. **Execution and attachment in respect of items described in the Schedule of Moveable property to the Proclamations of attachment/repossession/distrain of moveable property dated 13th January 2010 annexed to the notice of objection filed herein be stayed and lifted.**
 2. **The costs of the application be paid by the Defendant.**

THE OBJECTOR'S CASE

2. The application was supported by the Affidavit of Balvinder Singh, a director of the Objector, and was sworn on 2nd February 2010. The Objector's Written Submissions were dated 28th November 2014 and filed on 4th December 2014.
3. Its case was that it had a legal interest over the vehicles, furniture and fittings listed in the Proclamation. It was its averment that the Defendant charged the said vehicles to it to secure payments of advances it had made to the Defendant as was evidenced in the Deed of Hypothecation dated 9th February 2007.

THE PLAINTIFF'S CASE

4. In response to the said Application, Rebecca Chitwa Opati-Juma, a Senior Legal Officer of Lion of Kenya Insurance Company swore a Replying affidavit on 26th February 2010 on behalf of the Plaintiff. It was filed on even date. The Plaintiff's Written Submissions were dated and filed 27th April 2010.
5. The Plaintiff was insured by the said Insurance Company. It brought the suit herein in its name on behalf of the Insurance Company under the rule of subrogation and obtained judgement against the Defendant on 25th April 2008 for Kshs 7,994,974/=. The decree was issued on 8th June 2008.
6. The Defendant filed an application dated 2nd June 2008 seeking orders to set aside the judgment but the same was dismissed on 25th June 2008. On 26th June 2008, it filed another application to set aside the order that had dismissed its application of 2nd June 2008 but the same was also dismissed on 7th October 2008.
7. The Plaintiff's Bill of Costs was taxed by consent in the sum of Kshs 265,731/= and a Certificate of Taxation issued on 12th May 2009. When the Plaintiff proclaimed the Defendant's goods on 13th January 2010, the Objector filed the present proceedings. The Plaintiff contended that the Defendant did not provide proof of ownership of furniture and fitting and further that the goods attached belonged to the Defendant and not the Objector as none of the vehicle were registered in the Objector's name.
8. The Plaintiff averred that the said Deed of Hypothecation was void for want of registration as was required under Section 13 (1) (c) of the Chattels Transfer Act. Further, it stated that the said Deed of Hypothecation had not been stamped in accordance with the provisions of Section 38 of the Stamp Duty Act Cap 480 (Laws of Kenya) which provides that no instrument shall be registered under The Chattels Transfer Act unless the original duly stamped had been produced to the Registrar.
9. It stated that the said Deed of Hypothecation could not be received in evidence as the same had not been stamped as was required under the provisions of Section 19 (1) of the Stamp Duty Act. It said that the same could only be enforced against the Defendant if there was default, which was not the case herein and that in any event, the same could not affect the rights of other third parties.
10. It stated that the Objector had failed to prove any legal or equitable interest in the property attached in execution of the decree and therefore sought the dismissal of the present application with costs to it.

LEGAL ANALYSIS

11. It is a well settled principle that an objector must prove on a balance of probabilities, that he is entitled to or has legal or equitable interest in the whole part of the property attached.
12. The Objector referred the court to the case of **Automec Engines & Components Limited vs Habib Bank Limited [2002] eKLR** in which it said the court therein declined to order release of goods that had been repossessed under a similar deed as there was equitable interest that had been acquired under the deed.
13. Several Copies of Records from Kenya Revenue Authority showed that some of the proclaimed vehicles were registered in the Defendant's names alone, others were in the joint names of the Defendant and other third parties while others were in the joint names of unknown third parties. None of the owners and co-owners of the said vehicles had objected to their proclamation.
14. Registration of a person as an owner of a vehicle is *prima facie* proof of ownership. According to Section 8 of the Traffic Act Cap 403 (Laws of Kenya) provides that:-

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to the owner of the vehicle.”

15. As none of the said vehicles were registered in the Objector's name, it was correct as the Plaintiff pointed out that the Objector failed to establish any legal or equitable interest in the proclaimed vehicles. The Objector did not also provide proof of ownership of the proclaimed furniture and fittings. On this ground alone, the Objector's application would fail in the first instance.
16. As regards the Deed of Hypothecation the Objector submitted that the proclaimed goods were assigned to it and that the debt had not been settled. It was categorical that the said Deed did not

fall within the meaning of an instrument under the Chattels Transfer Act Cap 28 (Laws of Kenya) as had been contended by the Plaintiff.

17. In the Chattels Transfer Act, “**instruments**” are defined as:-

“...any instrument given to secure the payment of money or the performance of some obligation and includes any bill of sale, mortgage, lien or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or lease...” underlining supplied

18. Instruments that are required to be registered under the Chattels Transfer Act do not include debentures and interest coupons issued by any company or other corporate body and secured upon the capital stock or chattels of that company or other corporate body.

19. In Section 2 of the Chattels Transfer Act, “**chattel**” is defined as:-

“any movable property that can be completely transferred by delivery and includes machinery, stock and the natural increase of stock...”

20. A Deed of Hypothecation is an agreement between a borrower and a lender wherein a lender pledges an asset as collateral on a loan given to him by the lender without the lender taking possession of the asset but reserving his right to repossess the assets if the borrower defaults in payment of the loan so advanced. On the other hand, a debenture is a type of debt that is not secured by physical assets or collateral but rather it is backed by the general credit worthiness of an issuer.

21. It was clear from Clause 4 of the said Deed of Hypothecation that the Defendant had created a charge in respect of the said vehicles as security of repayment of the loan. The Deed of hypothecation herein was an instrument to secure payment of the loan given to the Defendant by the Objector by way of creating a charge on the vehicles and was thus required to be registered in accordance with the provisions of Section 13(1) (c) of the Chattels Transfer Act as it fell within the definition of an “**instrument**” under Section 2 of the Chattels Transfer Act.

22. The Objector did not provide any evidence that the said Deed of Hypothecation was duly stamped or registered. In the absence of proof that the same was registered, the court found the same to have been void for want of registration. Similarly, in the absence of proof that the same was stamped, the court found that the same could not be admissible in evidence in the matter herein as was also held in the case of Nyali Chemicals Limited vs Thugi River Estate Limited & Another [2005] eKLR that was relied upon by the Plaintiff.

23. This was a position that was taken in the case of National & Grindlays Bank versus Dharamshi Vallabhji & Others [1966] E.A 186 that was cited by the Plaintiff, where the appellate court underscored the importance of registration of instruments under the provisions of Sections 13 and 14 of the Chattels Transfer Act in order to make such instruments effective against persons who were not parties to it.

24. Accordingly, having considered the pleadings, affidavit evidence, written submissions and case law in support of the respective parties’ cases, the court found and held that the Plaintiff would not have been required or obligated to take notice of the said hypothecation as the said Deed of Hypothecation as the same had not been registered or stamped in accordance with the law. In any event, the Deed of Hypothecation could only be invoked in the event the Defendant defaulted in payment of the monies the Objector had lent it.

25. Notably, the Objector did not provide the court with any evidence to show that the Defendant had defaulted in payment of the said monies or what was the current status of the debt was. The Deed of Hypothecation was dated 9th February 2007 while the Objector’s application was filed on 4th February 2010. It was expected that the Defendant had been repaying its loan as the Objector had not deemed it necessary to invoke the provisions of Clause 4 of the said Deed of Hypothecation.

26. It would be inequitable for the Objector whose security had not been secured by way of a valid and registered Instrument, who did not have titles to the vehicles, whose Instrument for Transfer of the vehicles had not been registered or stamped as required by the law and who had not confirmed how much of the monies was due to it from the Defendant to be granted the orders that

had been sought herein and thus keep the Plaintiff away from its fruits of judgment. From the foregoing, it was clear that the Objector failed to provide sufficient evidence to demonstrate that it was entitled to bring the objection proceedings herein.

27. It is important to point out that the position would have been very different if the said Deed of Hypothecation had been duly registered and stamped. The Objector would have for all purposes and intent been a secured creditor in which case the Plaintiff would not have had any right to proclaim and attach the Defendant's goods as had been observed in the case of **Automec Engines & Components Limited vs Habib Bank Limited** (Supra).

DISPOSITION

28. In the circumstances foregoing, the upshot of this court's ruling was that the Objector's Chamber Summons dated 2nd February 2010 and filed on 4th February 2010 was not merited and the same is dismissed with costs to the Plaintiff herein.

29. For the avoidance of doubt, the orders for stay of execution that were issued herein upon filing the said application are hereby discharged and/or set aside.

DATED and DELIVERED at NAIROBI this 29th day of April 2015

J. KAMAU

JUDGE