



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT N O. 85 OF 2013

CONSOLIDATED BANKI OF KENYA LTD.....PLAINTIFF

VERSUS

AHMED ANWAR SHEIKH.....DEFENDANT

AND

ATACO FREIGHT SERVIES CO. LTD.....OBJECTOR

RULING

1.On 4th September 2013 the parties in this matter entered into a consent judgment for the plaintiff for Ksh 12,082,069.90 plus interest. Parties also consented to payment of that judgment amount by instalments. The defendant failed to pay the decretal sum by instalments as agreed and the plaintiff proceeded to execute the decree by attachment of defendant's movable goods.

2.That execution process provoked an objection by Mohamed Abdulaziz. By a Notice of Motion dated 4th August 2014, the objector sought attachment of a trailer No. ZD 4606 Chasis No. AASO-0014-2013 to be lifted.

3.The court began to hear that Notice of Motion and on 17th September 2014 after considering submissions made the court found that there was confusion on the exact vehicles that had been attached and the ones that had been released to a previous objector by the name of Paps Logistics limited. The court on that day granted leave to all parties to file further affidavits to clarify this issue.

4.On the next mention date of 24th September 2014, since there was no clarity, the court ordered the court bailiff to visit CMC Mombasa branch, where the vehicle were said to have been stored and to make a report on his findings thereof.

5.The confusion persisted even after the court bailiff wrote his report and on 17th December 2014 the court ordered the auctioneer to prepare a report disclosing the identity of the buyers of the subject trailer.

6.When the matter came up on 26th May 2015 for further hearing of Notice of Motion dated 4th July 2014 the learned counsel for objector argued that the hearing could not proceed further because the auctioneer had not supplied the information required of him by the order of 17th December 2014.

7.That submissions was objected to by counsel for the plaintiff who submitted that the court was engaging in investigation of the matter rather than hearing the application. Plaintiff therefore sought the orders of 17th December 2014 be discharged.

8.I have considered the submissions made by learned counsels. Indeed it is only under the Civil Law Tradition that the judiciary is permitted to investigate matters. The author Dr.Vivienne O'connor in her paper titled common Law and Civil Law Tradition, when discussing Civil Law Tradition she stated:-

“An investigating Judge is a member of the Judiciary.....instead of adjudicating cases, like a common Law Judges would, the investigating Judge is responsible for leading the criminal investigation which include interviewing the accuse, the victim, and witnesses; and preparing the case file (Known as dossier) to be passed to a sitting Judge.

9.On the converse the common Law Tradition which Kenya follows a Judge cannot carry out investigation. That author had this to say:-

“ Compared to the Civil Law Tradition, police in common Law countries have significant independent, and investigative powers”.

The learned author went further to state in regard to common law Judges thus:-

“At trial, the judges act like a referee with the two parties”

10.It is clear from those excerpts that it is the responsibility of the parties to present their case to a common law Judge, which I am, and that judge then acts as a referee and proceeds to determine the dispute before court.

11.I am satisfied that the auctioneer has filed affidavits and having done so the court can play no further role of investigation in regard their sufficiency in explaining about the attached trailer the subject of these objection proceedings. It is for that reason I do hereby set aside the orders made by this court on 17th December 2014 requiring the auctioneer to supply, information and for the court bailiff to do a further report.

12.Consequently the Notice of Motion dated 4th July 2014 which is part heard before me will be heard further, if need be, on a date to be fixed at the reading of this Ruling.

It is so ordered.

DATED AND DELIVERED ON THIS 28TH DAY OF MAY 2015.

MARY KASANGO

JUDGE

28th May 2015

Coram

Before Justice Mary Kasango

C/Assistance – Kavuku

Present for plaintiff

present for defendant

present for objector (Mohamed Abdulaziz)

Court : Ruling read in their presence/Absence in open court.

JUSTICE MARY KASANGO