



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 6 OF 1997**

**BETWEEN**

**M S K .....PETITIONER**

**VERSUS**

**S N K.....RESPONDENT**

**S M I.....CO-RESPONDENT**

**CONSOLIDATED WITH**

**HCCC NO. 160 OF 1997(O.S)**

**M S K .....PETITIONER**

**VERSUS**

**S N K.....RESPONDENT**

**AND**

**H G T C LTD..OBJECTOR/APPLICANT**

**RULING**

1. Before court for determination is a Notice of Motion application dated 23<sup>rd</sup> August, 2011 brought under Order 22 Rule 51 and 52 of the Civil Procedure Rules, **Section 69(1)** and 96 of the Transfer of Property Act 1882. In the said application the Applicant seeks the following orders, which I set out herein verbatim, that:
  - a. That there be a stay of proceedings in relation to the Notice to show cause why execution should not issue dated 3<sup>rd</sup> February 2011 currently ongoing before the learned Deputy Registrar.
  - b. That L.R. No. [*particulars withheld*], Nairobi South C, Nairobi/Block [*particulars withheld*] and L.R. No[*particulars withheld*] be and hereby excluded in attachment and sale, registration of prohibitory orders against their titles or in any other mode of execution of the decree herein till the loan of Kshs. 73, 126, 592.00 guaranteed by S N K and J C T Ltd vide a guarantee date 15<sup>th</sup> June, 2004 and secured by the Titles to the said properties is repaid in full and the properties released by the Objector.
  - c. That costs of this application be awarded to the Objector.

2. The application is predicated upon the grounds set out in the application - that the Objector claims secured creditor's interest in respect of the named properties L.R. No. [particulars withheld],, Nairobi/Block [particulars withheld],, Nairobi/Block [particulars withheld], and L.R. No. [particulars withheld]; that vide a guarantee dated 15<sup>th</sup> June 2004 S N K was indebted to the tune of Kshs. 73, 126, 592, through Panatech Limited for electronic goods supplied and the said debt was secured by surrender of Title Documents for L.R. No. [particulars withheld],, Nairobi/Block [particulars withheld],, Nairobi/Block [particulars withheld], and L.R. No. [particulars withheld], till the said debt was paid in full; that the guarantee was duly registered and prohibitory order issued by the High Court in HCCC No.697 of 2003 restraining any dealings in the above mentioned properties till a sum of Kshs. 73,126, 592 plus interest is paid in full and therefore these properties are not available for attachment and sale, as per the application for execution of decree filed on the 28<sup>th</sup> January, 2011 by the petitioner; that the attachment and sale of the subject properties will visit grave injustice on the Objector's interest hence unlawful and that the Objector is not a party of the Divorce proceedings and has no other interest except recovery of his debt.
3. The application is supported by the affidavit of R N, the representative for H G T C Ltd, the Objector therein, sworn on even date. The applicant contends, and in reiterating the grounds as set out in the application, that on the 15<sup>th</sup> June 2004, the Respondent and Jaribu Credit Traders Limited entered into a guarantor's agreement with their Company H G T C Ltd in which they guaranteed the repayment of Kshs. 73, 126,592, by surrender of Title Documents for L.R. No. [particulars withheld],, Nairobi/Block [particulars withheld],, Nairobi/Block [particulars withheld], and L.R. No. [particulars withheld], to the Decree-holder as security, which Title Documents were to be used to secure a Loan from the Bank by the Respondent on the understanding that 75% of the loan was to be utilized to settle the amount owed to Hala General Trading Company Ltd the Objector herein.
4. In opposing the application, the Petitioner, M S K, filed a Replying Affidavit on 21<sup>st</sup> October, 2011. It is averred in that affidavit that the Respondent was aware of her interest in the mentioned properties as far back as 1997 when she filed her application for division of matrimonial property under Section 17 of the Married Women's Property Act. Therefore, she contends that the Respondent could not purport to enter into a Guarantee contract with the Objector in 2004 when the hearing of her application was on going. Further, she contends that it is clear from the official searches to the Nairobi/Block [particulars withheld], and Nairobi/Block [particulars withheld], that the orders issued in this matter were registered against the titles way before the said order in High Court Case No. 697 of 2003 was registered against the titles and has not been registered title to L.R. No. [particulars withheld], at all. She avers that the Decree in this matter therefore takes precedence over a purported consent order that was obviously meant to prejudice any Decree that might be given in this matter; that the said purported order in High Court Case No. 697 of 2003 was in fact registered against the said titles on 8<sup>th</sup> February 2011 after she had filed her application for execution on 3<sup>rd</sup> February, 2011 and the same is therefore only meant to scuttle the execution process. Further, that in the Supporting Affidavit there is no mention of how much is owed by the Respondent to the Objector if at all and that there is no statement of account provided. She contends that if indeed any amount is owing to the Objector, the same can be paid from the sale proceeds of the subject properties after the satisfaction of the decretal amount, and there is therefore no prejudice to the Objector if her application for execution does proceed to its logical conclusion. It is her averment, that the allegations that the Guarantee was to enable the Respondent borrow from banks in order to repay the Objector are baseless, that the loan documents with the bank which are annexed to the application by Prime Bank Limited do not at all mention this arrangement and it is instructive that the facility with Prime Bank Limited was purportedly offered in 2009 five years after the said Guarantee and Indemnity. The Deponent contends that if a Guarantee and Indemnity had been purportedly executed by the Respondent and Objector in 2004, it would not have been necessary for the Objector to go to court in 2005 as it did since it would have been a 'secured creditor' as is being alleged now, and that the said Guarantee is therefore a creation of the Respondent in cahoots with the Objector for the purpose of countering her application for execution.
5. The Court has considered the application and the affidavit in support, the affidavit in opposition to

the same and the submissions made by the parties. It would, on the face of it, seem a fairly simple matter to resolve, but which the parties seem to have failed to find an amicable and expeditious resolution. The Objector's contention is that it has a secured interest over the said properties owing to a guarantee dated 15<sup>th</sup> June, 2004 between Jaribu Credit Traders Limited, S K and the Objector. This forms the basis of the application herein. Further that vide the said guarantee S N K was indebted to the tune of Kshs. 73, 126, 592, through Panatech Limited for electronic goods supplied and the said debt was secured by surrender of Title Documents for L.R. No. [particulars withheld], Nairobi/Block [particulars withheld], Nairobi/Block [particulars withheld], and L.R. No. [particulars withheld], till the said debt was paid in full; that the guarantee was duly registered and prohibitory order issued by the High Court in HCCC No.697 of 2003 restraining any dealings in the above mentioned properties till a sum of Kshs. 73,126, 592 plus interest is paid in full and therefore these properties are not available for attachment and sale, as per the application for execution of decree filed on the 28<sup>th</sup> January, 2011 by the petitioner; that the attachment and sale of the subject properties will visit grave injustice on the Objector's interest hence unlawful and that the Objector is not a party of the Divorce proceedings and has no other interest except recovery of his debt.

6. The Respondent's contention is that Respondent, S N K, was aware of her interest in the mentioned properties as far back as 1997 when she filed her application for division of matrimonial property under Section 17 of the Married Women's Property Act. Therefore, she contends that the Respondent could not purport to enter into a Guarantee contract with the Objector in 2004 when the hearing of her application was on going. She contends that if indeed any amount is owing to the Objector, the same can be paid from the sale proceeds of the subject properties after the satisfaction of the decretal amount, and there is therefore no prejudice to the Objector if her application for execution does proceed to its logical conclusion.
7. Order 22 Rule 51 of the Civil Procedure Rules under which the application is brought provides thus:

*“(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”*

Rule 52 of the said Order provides as follows:

*“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.”*

8. The above Rules in my view set out rather distinctly what an Objector in an application such as in the instant case is required to demonstrate. The Objector must establish that he has a claim over the attached property by reason of being entitled to the property or by reason of a legal or an equitable interest to either the whole or part of the attached property. In the case of **Akiba Bank Ltd vs. Jetha & Sons Ltd (2005) eKLR Waweru J had this to say:**

**“For an objector to succeed in his objection he must exhibit evidence of his legal or equitable interest in the whole or part of any property attached in execution of a decree.”**

9. **The issue therefore, is whether the Objector herein has shown evidence of its legal or equitable interest in the whole or part of the said properties. It is the Respondent's submission that the properties the subject of the objection application were specifically subject to the application made under the Married Women's Property Act 1882 for the division of matrimonial property between the Applicant and the 1<sup>st</sup> Respondent, Mr. S N K**

**in Miscellaneous Civil Application No. 1606 of 1997 and the court was therefore seized of the matter as far back as 1997 and therefore the said guarantee which was purportedly executed in 2004 without the knowledge or consent of the Respondent herein is null and void.**

**10. I agree with the Respondent's contention that the 1<sup>st</sup> Respondent who was a party in the said Miscellaneous Cause was aware of the Respondent's claim over the said properties and it could only have been an attempt to defeat the Respondent's cause by purporting to make the said properties a subject of a guarantee in 2004 when the matrimonial property case had been ongoing for seven years since 1997.**

11. An order for stay is discretionary, which in the present circumstances, would not be made to assist the Applicant extricate themselves from circumstances of their own making. This Court must uphold both the principles of justice and equity. In so doing, the Court shall not aid a party at fault, when the aid has become necessary through his or her own fault. As has been shown **the 1<sup>st</sup> Respondent who was a party in the said Miscellaneous Cause was aware of the Respondent's claim over the said properties and chose to make the said properties the subject of a guarantee.** In view of the foregoing, I doubt if the objection application herein has been made in good faith. As has been ably enumerated by the Respondent, the purported guarantee is between parties who had no locus to charge properties in which 50% is owned by the Respondent without her consent or knowledge.

12. The question is whether the attachment and sale of the subject properties will visit grave injustice on the Objector's interest? I do not think so. As rightly pointed out by the Respondent the terms of sale will be settled in any event and the Objector will be free to lay a claim on the sale proceeds then upon evidence.

13. I find that the application dated 23<sup>rd</sup> August, 2011 is without merit and must fail. It is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>ST</sup> DAY OF MARCH, 2014.

W. MUSYOKA

JUDGE