



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 360 OF 2011

W. KORDES SOHNE PLAINTIFF

VERSUS

KALKA FLOWERS LIMITED DEFENDANT

RULING

1. On 3rd April 2013, the Objector herein filed a Notice of Motion brought under the provisions of **Order 22 rules 51, 52, 53 and 54** of the *Civil Procedure Rules, 2010* as well as **Sections 1A and 3A** of the *Civil Procedure Act*. The application prayed for a stay of the warrants of attachment and sale issued by this Court on 19th February 2013 as regards the attachment and sale of a motor vehicle registration number KAZ162J (hereinafter “the motor vehicle”). The application also requested this court to lift the proclamation and attachment of the motor vehicle as the same was registered in the joint names of the Objector and one Pillai Srithar Arumugiam. Neither of these two parties was in any way individually involved with the suit before Court.
2. The Objector’s said application was supported by the affidavit of its Legal Officer one **Gregory Omusolo** sworn on 3rd April 2013. The supporting affidavit basically reiterated the grounds in support of the application which were set out as follows:

“a) The Objector, African Banking Corporation Limited, is a secured creditor to PILLAI SRITHAR ARUMUGIAM and an equitable and legal Owner of the motor Vehicle KAZ 162J (hereinafter “the motor vehicle”) by virtue of a Chattels Mortgage dated 25th June 2009 made between the Objector and PILLAI SRITHAR ARUMUGIAM (the Mortgagor).

b) Further, the said Chattels mortgage, in favour of the Objector, is security for monies subsequently advanced by the Objector to the Defendant, and which amounts remain outstanding from the Defendant to the Objector.

c) Pursuant to the said Chattels Mortgage the property in the Motor Vehicle is vested in the Objector during the pendency of the Mortgage and as long as the Mortgagor and/or the Defendant remain indebted to the Objector.

d) The Motor Vehicle is registered in the joint names of the Objector and the mortgagor, Pillai Srithar Arumugiam, and is not the property of the Defendant.

e) On 12th March 2013, the 3rd Respondent acting on warrants of attachment issued to it on 19th February 2013, attached the motor Vehicle and took it away from the Defendant’s

premises.

f) The debt owed to the Objector, being a secured debt, takes priority over the Plaintiff's claim against the Defendant, which is unsecured. In any event, the Motor Vehicle is not the property of the Defendant.

g) It is the interest of justice that the said proclamation and/or attachment be raised to prevent the Objector from having its security compromised.

h) Such other grounds and reasons to be adduced at the hearing hereof”.

3. The Plaintiff/Decree Holder filed a Replying Affidavit through its Country representative one **Bas Smit** sworn on 22nd April 2013. The deponent had been advised by his advocates on record that the Chattels Mortgage dated 25th June 2009, attached to the Objector's affidavit in support of its Application, was a nullity and of no effect for the reason that it was reported to have been executed by the mortgagor, Mr. Srithar, in front of an advocate called Nancy Waweru, who the Law Society of Kenya had indicated was not on its roll of advocates. The deponent attached copies of correspondence had with the Law Society in that regard. Further, the mandatory Affidavit to accompany a Chattels Mortgage, although it had been signed by the mortgagor, had not been signed by the said advocate or even dated. As a result, the Chattels Mortgage appeared to be a fraudulent document tendered at this stage, in order to deny the Plaintiff/Decree Holder the fruits of its judgement. There had been no explanation as to why there had been any need for the Objector, African Banking Corporation Ltd, to become the owner of the motor vehicle or for Mr. Srithar to execute a Chattels Mortgage. It appeared from the Chattels Mortgage, that the monies lent to Mr. Srithar had been disbursed in 2009 and there was no explanation why the Objector was only now seeking to repossess the motor vehicle. Similarly, the deponent wondered why the Objector had not attached and sold the other two vehicles covered by the said Chattels Mortgage.
4. The Objector filed a Further Affidavit, again through its said Legal Officer, sworn on 3rd May 2013. To my mind, the deponent provided a complete answer to the Replying Affidavit of the Plaintiff/Decree Holder at paragraph 3 of his Further Affidavit which reads as follows:

“3. In response to Paragraph 3 I wish to state as follows:

- a. **The assertion that the Chattels Mortgage dated 25th June 2009 is a nullity is not true for the reasons that:**
 - i. **The said Nancy Waweru has sworn an Affidavit, confirming that her names in the Roll of advocates appear as Migwi Nancy Wangaru for the reason that she is yet to regularize the position with the Law Society of Kenya after she got married and adopted her husband's name, WAWERU, hence changing her names to NANCY WAWERU.**
 - ii. **Further, the Law Society of Kenya has confirmed that MIGWI NANCY WAWERU is an advocate of the High Court of Kenya and that she held a valid practicing certificate as at 25th June 2009 when she witnessed execution by the Mortgagor, Pillai Srithar Arumugiam. (Annexed hereto and marked ‘GO-1’ is a copy of the letter of confirmation from the Law Society of Kenya).**
 - iii. **The Affidavit referred to as incompetent for lack of signature is the bank's copy and I do confirm that the affidavit filed at the Chattels Mortgage Registry was duly executed as required. As such, the Objector has since instructed its advocates on record to obtain a copy of the filed chattels mortgage to clarify the position. Accordingly, the said advocates have since written to the Registrar of Chattels Mortgages to avail them with a copy of the registered Chattels Mortgage. (Annexed hereto and marked “GO-2” is a copy of the letter from the said advocates to the Registrar of Chattels Mortgage).**
 - iv. **The allegation that the Chattels Mortgage is a fraudulent document tendered in order to**

deny the decree holder the fruits of its judgment is unmerited and unsubstantiated. The Objector confirms that indeed the Chattels Mortgage has been in force since June 2009. In fact, the Objector was in the process of realizing its securities under the Chattels Mortgage when it discovered that the decree-holder had attached Motor Vehicle KAZ 162J, despite the said motor vehicle being registered in the joint names of the Objector and Pillai Srithar Arumugiam and the Objector holding a security over the same.

- v. Further, annexure “GO-5” to my affidavit of 3rd April 2013 confirms the instructions of realization of security and the Auctioneers finding when they went to attach the Motor Vehicle, the subject matter of the Chattels Mortgage”.
5. Miss Nyawira, learned counsel for the Objector, submitted that as the motor vehicle was registered in the joint names of Mr. Srithar and the Objector, the proclamation attaching the same should be lifted and the motor vehicle be released to the Objector. She also asked that the storage costs that may have accrued as regards the motor vehicle at the auctioneers, be borne by the Respondents to the Application being the Plaintiff and the Defendants. The exhibits to the Supporting Affidavit clearly showed the registration particulars at the Registry of Motor Vehicles. Counsel maintained that the motor vehicle was so registered as a result of advances made to the Mortgagor by the Objector as evidenced by the Chattels Mortgage annexed to the Supporting Affidavit as Exhibit “GO 1”. Those loans remained unpaid to date as evidenced by the Statement of Account exhibited as Exhibit “GO 3” which showed an indebtedness to the Objector of Shs. 2,315,213/-. Having showed the Court that the Objector was the registered owner of the motor vehicle and is consequently the legal and equitable owner thereof as well as a secured creditor, counsel submitted that the motor vehicle should be released straight away. She noted that the question of the validity of the Chattels Mortgage had been clarified by the Replying Affidavit as aforesaid.
 6. In his turn, Mr. Isinta for the Plaintiff/Decree Holder stated that he did not wish to pursue the issue of the advocate who had witnessed the Chattels Mortgage and her change of name. However, the mandatory Affidavit as regards the Chattels Mortgage made between Mr. Srithar and the Objector had not been signed and, as a result, counsel submitted that it was void and unenforceable. He also maintained that the Objector should have obtained up-dated records from the Registry of Motor Vehicle and not to have relied upon old ones. Counsel also queried the *bona fides* of the Objector in only targeting the one motor vehicle whereas the schedule to the said Chattels Mortgage identified two other vehicles. In a quick rejoinder, Miss Nyawira submitted that as regards the issue of ownership, the log book of the motor vehicle was *prima facie* evidence thereof. If the Objector had not intended to pursue its objection, it would have no need to produce the log book for the motor vehicle before Court. As regards the validity of the Chattels Mortgage, this had been gone into as per the Further Affidavit of Gregory Omusolo.
 7. In my view, the above quoted paragraph 3 of Mr. Omusolo’s Further Affidavit clarifies the situation not only as regards the Chattels Mortgage having been witnessed by an advocate who is on the role of the advocates as per the Law Society but also whether or not the verifying Affidavit thereto was executed and dated. I am also satisfied that the Objector did not confine its efforts to the motor vehicle but also attempted to repossess Massey Ferguson tractors registration No. KAY 653L and KAY 282J. I am further satisfied that the Objector (mortgagee) alongside the said Mr. Srithar (mortgagor) are the Registered Owners of the motor vehicle. The copy of the Log Book No. R0534899L quite clearly reveals that ownership. As a result, it would appear that Messrs. Keysian Auctioneers would seem to have repossessed and executed against the motor vehicle which was not owned by the Defendant/Judgement Debtor herein.
 8. Accordingly, I allow the Objector’s Notice of Motion dated 3rd April 2013 and grant prayers 2, 3 and 4 thereof. As regards storage costs incurred in respect of the motor vehicle from 12th March 2013 (the date of attachment) until it is released to the Objector, such will be borne equally as between the Plaintiff/Decree holder and the Defendant/Judgement Debtor. The costs of the Notice of Motion shall be awarded to the Objector.

DATED and delivered at Nairobi this 20th day of March, 2014.

J. B. HAVELOCK

JUDGE