



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 93 OF 2009

PATRICK KINGORI WARUGONGO.....APPELLANT

Versus

JAMES NDERITU1ST RESPONDENT

POINTEX (K) LTD2ND RESPONDENT

(Appeal arising from the judgment of Hon. H Ndungu Senior

Principal Magistrate in Nanyuki Civil Case No. 8 of 2005)

RULING

BACKGROUND

1. By a plaint dated 3rd February 2005 and filed on 8th February 2005 the 1st Respondent JAMES NDERITU sued the 2nd Respondent POINTEX(K) LTD for a sum of Ksh. 188,262.50 being money due and owing from the 2nd Respondent to the 1st Respondent in respect of contractual works performed particulars whereof were stated in paragraph 3 thereof.
2. On 7th March 2005 the 2nd Respondent filed a defence in which it denied owing the said sum of money and or at all.
3. The matter proceeded for full hearing and on 23rd January 2008 the trial court Hon. Ndungu H.N. then Ag R.M. entered judgment in favour of the 1st Respondent and on 9th June 2008 a decree was issued therein for Kshs. 263,567.50 and a certificate of cost for 73,978 which was duly executed.
4. On 24th September 2008 the appellant herein PATRICK KINGORI WARUGONGO filed a notice of objection to attachment under then order XXI rule 54 of CPR and on 2nd October 2008 the 1st Respondent filed notice of intention to proceed with execution.
5. On 9th October 2006 the appellant took out objection proceedings under order XXI rules 56 and 57 on the basis that the attached items belonged to him and not the 2nd respondent and supported the same with an affidavit sworn on the same date together with annexed documents.
6. In response thereto the 1st respondent filed a replying affidavit wherein he deponed that whereas the appellant may well own some milling machinery similar to the subject of the attachment, the machinery attached belonged to the 2nd respondent and that motor vehicle registration No. KAH 099W does not belong to the objector.
7. On 27th May 2009 the matter proceeded for hearing before Ndungu H.N. when Mr. Karweru submitted that the attached machinery and motor vehicle belonged to the appellant and pointed to the importation documents of the mills bank advises, log book to motor vehicle registration No. KAH 223Q and insurance certificate for motor vehicle registration No. KAH 099M.
8. Mr. Kariuki for the 1st respondent submitted that the appellant did not refer to any serial number

- of the machines and that the same were attached at the premises of the 2nd respondent. It was further submitted that the objector was the only key witness to the 2nd respondent.
9. Based upon the said submissions the trial court on 8th July 2009 made a ruling in which she held that the appellant did not establish ownership of the machines and motor vehicle registration No. KAH 099M which had the name Patrick J as its owner.
 10. Being aggrieved by the said ruling the appellant filed the present appeal and raised the following grounds as per the memorandum of appeal.

1. The learned trial magistrate erred in law in attaching a higher than that by law allowed degree of proof of beneficial ownership of property thereby completely arriving at an erroneous decision.

2. The learned trial magistrate failed to note that upon an objector showing proprietary interest in any of the attached goods, the burden of proof shifted to the decree holder to disprove the said interest shown; thereby arriving at a completely erroneous determination in law; not supported by law of evidence.

4. The learned trial magistrate arrived at the wrong decision in law and in fact; not supported by evidence.

SUBMISSIONS

11. Directions were given that the appeal be heard by way of written submissions which have now been filed.
12. On behalf of the appellant it was submitted that the degree of proof in civil matters is on a balance of probability and that the trial court was wrong in holding that the appellant needed to prove almost beyond reasonable doubt that the attached property was his.
13. It was further submitted that the trial court was wrong in holding that the appellant had failed to prove beneficial interest and that the location of the machinery was not relevant.
14. On behalf of the 1st Respondent it was submitted that the appellant did not file certified copy of the order appealed against and therefore the appeal is incompetent.
15. It was submitted that the circumstances may well point out that at the time of importation, the attached goods were owned by the appellant the fact of importation is not synonymous with ownership and that the goods were proclaimed in premises belonging to the 2nd respondent and that since the machinery had no form of identification by way of serial number it would have been impossible for the trial magistrate to arrive at a conclusion that the machinery imported by the objector was the subject of attachment.
16. It was submitted that there was no material placed before the court to give rise to presumption of ownership by the appellant and that the fact of the machinery being in the premises of the 2nd respondent was established. It is submitted that the burden of proof of ownership belonged to the appellant throughout.
17. From the proceedings before the lower court and the submission before me the following facts are not in dispute.

1) That there was a contract between the 1st and the 2nd respondent.

2) That the objector was the managing director of the 2nd respondent.

3. There is evidence on record for the lower court that the attached machines did not belong to the 2nd respondent per the evidence of the objector page 24.

1. The only issue in dispute is whether the appellant had established on a balance of probability that the attached goods belonged to him and not to the 2nd respondent judgment debtor
2. As in any civil proceedings the burden of proof which was required of the appellant was to prove on a balance of probability that the attached goods were his and not of the judgment debtor and in this the trial court was in error in finding/holding that the onus was on the objector to prove almost

- beyond reasonable doubt that the attached property was his. The burden was on a balance of probability.
3. It is further clear from the judgment appealed against that the trial magistrate misapplied the principles in lifting the corporate veil in an objection proceedings by stating that “the companies 'ear' should not be punctured through execution proceedings.”
 4. In the case of AKIBA BANK LTD v JETHA & SONS LTD (2005) eKLR quoted by Mutava J in NARAN HIRANI t/a CLASSICO BUILDERS vs MAINA MWANGI and EVERLYN WANJIKU KARANJA WAWERU J held that 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 decree
 5. Further Odunga J in DUBAI BANK (K) LTD v COME-CONS AFRICA LTD and IMPAK HOLDINGS CO LTD. Stated as follows:

Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings but simply decide whether or not the objector has interest legal or equitable in the attached property it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see CHATABHAI M. PATEL & ANOTHER HCCC NO. 544 OF 1957 (Lewis) on 8/12/58 HCU(1958) 743. emphasis added

6. Did the objector therefore establish on a balance of probability his interest on the attached good? From the said documentary evidence tendered before the trial court, it is clear that the objector had established his interest on the attached goods by submitting copies of import entry, invoices, log books and insurance certificate and therefore the fact that the attachment machinery were in the premises of the 2nd Respondent did not rebut the objectors interest (legal or equitable) on the said items and having established then the burden thereafter shifted to the 1st Respondent to establish that the goods belonged to the 2nd Respondent and not the Objector which it failed to do.
7. It is therefore clear that the trial magistrate in dismissing the objection herein fell into error for which this court has to interfere with her ruling which I hereby set aside and allow the objection by lifting the attachment herein.
8. In the final analysis I allow the appeal herein with cost to the appellant to be paid by the 1st respondent.

Dated and delivered at Nyeri this 4th day of April 2014.

J. WAKIAGA

JUDGE

Mr. Kariuki for the respondent.

Mr. Muhoho for Mr. Karweru for the appellant.

Court: Judgment read in the open court.

J. WAKIAGA

JUDGE