



No.33/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO. 110 OF 2009

NANCY NYAWIRA1ST PLAINTIFF/RESPONDENT

RICHARD WAMBUGU NGIBUINI2ND PLAINTIFF/RESPONDENT

VERSUS

ARCHER DRAMOND MORGAN LIMITED.....DEFENDANT/ JUDGEMENT DEBTOR

JOHN ROKI WAITHAKA OBJECTOR/APPLICANT

RULING

1. This matter is for application dated 19.9.2014 brought under Order 22 Rules 51 and 52 Civil Procedure Rules (2010). The same seeks Orders namely:
 - a. That this Application be certified as urgent and service of the same be dispensed with in the first instance.
 - b. That there be a stay of execution of the warrants of attachment and sale issued to M/s Bealine Kenya Auctioneers in the matter hereof pending the interpartes hearing of this Application.
 - c. That there be a stay of execution of the warrants of attachment and sale issued to M/s Bealine Kenya Auctioneers in the matter hereof pending the hearing and final determination of this Application.
 - d. That the Proclamation made on 15.9.2014 by M/s Bealine Kenya Auctioneers against the Objector's/Applicant's goods be lifted unconditionally.
 - e. That costs of this Application be borne by the Plaintiffs/Decree Holders.

The Application is based on the grounds on the face of the motion namely:

- i. The attached properties belong exclusively to the Objector/Applicant.
- ii. The Objector/Applicant hereof is not the named Defendant/Judgment Debtor but only a

- Shareholder/Director of the Judgment Debtor and has no other nexus to this suit or the subject matter of the dispute or cause of action between the Plaintiffs/Decree Holders and Defendant/Judgment Debtor.
- iii. The Judgment Debtor is juristic person, a body corporate with a different persona, distinct legal identity and legal existence.
 - iv. The said Auctioneer failed to verify ownership of the proclaimed goods before execution, or was alternatively misled by the Decree Holders as to the true identity of the Judgment Debtor's assets leading to a miscarriage of justice.
 - v. The Objector/Applicant is suffering a major inconvenience and embarrassment of being dragged into legal proceedings he is otherwise not party to.
2. The Application is supported by the affidavit of John Roki Waithaka sworn on 19.9.2014. The Application is opposed by the Respondent by way of an affidavit of John M'Mbijiwe sworn on 30.9.2014.
 3. On 23.10.2014 the matter came up for hearing and the Objector and the advocate were absent. The court fixed ruling date for 28.11.2014. The Respondent/Plaintiff has filed written submissions but the Applicant has not filed any. The Applicant's case can be summarized from his replying affidavit. The Applicant is a shareholder of the Respondent/Judgment Debtor and is not a party to the suit.
 4. On 15.9.2014 the Auctioneers went to his (Objector's) residence in Runda Estate, Nairobi and proclaimed 2 motor vehicles namely KBW 493K and KBV 700M and an assortment of other properties in execution of the decree herein issued in favour of the Plaintiff against the Defendant. The Objector/Applicant avers that all the proclaimed properties are his and have never been Defendant's properties.
 5. The Applicant annexes 2 copies of log books JW2. The Objector avers that despite his protestation, the Auctioneer went ahead to proclaim his 2 motor vehicles and other properties listed in the proclamation. He therefore seeks the lifting of proclamation of his properties. In his Notice of Objection to attachment dated 19.9.2014 he listed the 2 motor vehicles, 6 dining tables, 7 seater sofa set, shower heads, plumbing pipes, assorted paints and assorted bedding materials as his properties proclaimed.
 6. The Plaintiffs/Respondents' case is captured by the content of the Replying Affidavit by John M'Mbijiwe sworn on 30.9.2014. The Plaintiff avers that Auctioneers by name of BEALINE Kenya Auctioneers were instructed by the Plaintiffs' Advocate on 22.8.2014 to execute herein by way of attachment of movable properties and they were directed by the Plaintiff to the Defendants offices at Capitol Hill Towers Upper Hill next to Kilimo House, Ministry of Agriculture. He visited the premises together with his agent namely Evelyn Muturi but the caretaker they found in the premises informed them that the Defendant relocated to their construction site in Athi River.
 7. The Auctioneers moved to the site above where they found developed residential houses known as Hillcrest Estate. The Plaintiff informed them that it was the same estate where she was sold a house No.8 which was the subject matter of the suit. Through investigations they established the residence of the Objector who is one of the directors of the Defendant. On 15.9.2014 they proclaimed the 2 motor vehicles believing to be Defendant's Company properties.
 8. On 15.9.2014 they also proceeded to Hill Crest Estate at Mombasa Road, near Athi River and London Distillers Ltd. where they found 2 guards at the gate and explained the purposes of their visit and asked to be shown the offices of the Defendants. They confirmed indeed that those were Defendant's developments. They were taken to an office where they met a lady called Caroline who introduced herself to be Marketing Manager of the Defendant.
 9. It is in the above circumstances that the Auctioneers proclaimed Furniture in office construction materials found on site. It is only the 2 cars which were at the Objector's residence but not other proclaimed items which were at Defendant offices and site.
 10. The Plaintiff concedes that the motor vehicles are owned by the Objector but not the other proclaimed items.

ISSUES FOR DETERMINATION

11. After perusing the Application, supporting affidavit and the replying affidavits the following

issues appear to emerge namely:

- **Do the proclaimed items belong to the Objector?**
- **What is the order as to cost?**

12. The Plaintiff and the Auctioneers concede the 2 motor vehicles belong to the Objector and were proclaimed while at the Objector's Residence. What remain in issue then are the other proclaimed items. The Objector alleges that the proclaimed items belong to him. The objector has not put any documents to prove ownership of the other items.

13. The Plaintiff has via Affidavit of John M'Mbijiwe in detail explained how he went to the residence of the Objector and proclaimed 2 motor vehicles and then proceeded to the Defendant premises where they proclaimed the other proclaimed items. The Objector has not responded to the extensive content of the replying affidavit of John M'Mbijiwe Auctioneers.

14. The Objector's advocate had sought leave to file an affidavit to respond to the replying affidavit on 6.10.2014 but same was not filed. The court is left with no option but to take the contents of replying affidavit as unrebutted.

15. Taking to account that the only prove of ownership of the proclaimed properties produced was in respect of the 2 motor vehicles, it is this court's findings that the other proclaimed items belong to the Defendant Judgment Debtor. The court therefore makes the following orders:-

1. **The proclamation on motor vehicle KBW 493K and KBV 700M be lifted forthwith.**
2. **The other proclaimed items to be attached and sold to recover the decretal amount.**
3. **½ costs to the Objectors.**

Signed and Delivered at Machakos this 28th day of November, 2014.

CHARLES KARIUKI

JUDGE