



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APP NO. 802 OF 2010

ARUN C. SHARMA.....PLAINTIFF

Versus

ASHANA RAIKUNDALIA T/A

A. RAIKUNDALIA & CO. ADVOCATES.....1ST DEFENDANT

NISHIT RAIKUNDALIA.....2ND DEFENDANT

SAPPHIRE TRADING & MARKETING LTD.....3RD DEFENDANT

AND

ASL CREDIT LTD.....1ST OBJECTOR

VINODCHAMADRA DEVJ & MRADULABEN

DEVJI.....2ND OBJECTOR

RULING

Objection Proceedings: Two Applications

[1] There are two applications for Objection proceedings dated 4th July 2014 and 1st September 2014 by the 1st and 2nd Objectors, respectively. I will deal with each application on merits and make a determination on each separately. The application dated 4th July 2014 is referred to and discussed as “*The First Application*” while the one dated 1st September 2014 is dealt with as “*The Second Application*”.

THE FIRST APPLICATION

[2] The first application is the one dated 4th July 2014. In that application, the objector is asking the court to declare the attachment of motor vehicles registration numbers KBQ 774R and KBC 268F unlawful, raise it and return the vehicles to the objector. The application is supported by two affidavits of PARAPIK PATEL. The 1st objector is a limited liability company and claims to have legal and equitable ownership of the attached motor vehicles and is qualified to apply under Order 22 rule 51 of the Civil

Procedure Rules. Copies of log books to the two vehicles were attached as annexure PP4 and PP5 as evidence of their legal and equitable ownership in motor vehicle KBQ 774R. A letter from the objector forwarding copies of the logbooks to “whom it may concern” which also suggests that they hold the logbooks on a hire purchase agreement is also attached. The objector argued that, under section 8 of the Traffic Act the person in whose name the logbook is registered is the owner of the vehicle unless it is proved otherwise. They cited the case of **TNT Express (K) Limited vs. Elsek & Elsek (K) Limited** to support that position of law.

[3] The objector annexed evidence to show it financed the purchase of motor vehicle KBC 268F under hire purchase agreement number 1425/sep2013. And that, full hire purchase price has not been paid. Therefore, since the objector was not a party in the suit, and has shown equitable interest on the vehicles, they should be released to it.

The attaching creditor opposed the first application

[4] The attaching creditor opposed the application on the basis that it is the 2nd defendant who offered the said vehicle to the auctioneer when he visited their premises to execute the warrants of attachment herein. Indeed, he noted the hand-over of the vehicle in writing. The attaching creditor submitted that the objector has the onus to prove the attached vehicle are theirs and cited the cases of **Awo Shariff t/a Mohammed Investment vs. Abdulkadir Shariff Mohammed & Another (2006) eKLR** and **Scan house Press Ltd vs. Times Services Ltd No 412 of 2008** to support that position of the law. The attaching creditor argued that the annexed log book shows the owner of KBC 268F is the 3rd defendant not the objector as claimed by them. They also submitted that the Hire Purchase Agreement annexed is not registered as required under section 5(1) and (4) of the Hire Purchase Act and no stamp duty has been paid pursuant to section 19(1) of the Stamp Duty Act. They cited the case of **Fidelity Commercial Bank Ltd vs. Agritools Ltd & 3 others [2004] eKLR** to support the position that such unregistered Hire Purchase Agreement is neither enforceable nor proof of any legal or equitable interest in the vehicle. As such, those Hire Purchase Agreements cannot be said to be genuine or capable of admission in evidence. They were manufactured to make objection proceedings. The vehicles are, therefore, liable to execution. The attaching creditor even cast doubt on the agreements which they submitted may have been manufactured to defeat execution herein. They also suspect that the 1st objector has not told the court why it did not give notice required under Order 22 rule 51 of the CPR because it could be the defendants doing all these in the guise of objection proceedings. They then made a proposal in the submission: to sell the vehicles and pay off the balance of Kshs. 851,000 which the 1st objector claim it is owed in the alleged hire purchase agreement. Nonetheless, the objector has not proved any equitable or legal interest in the attached motor vehicle. Last but not least, the attaching creditor saw mischief when the 1st objector and his parents who are the 2nd objectors each lays distinct ownership claim over the same house. On those reasons, the attaching creditor prayed for the court to dismiss the objection and allow the sale of the attached vehicles towards satisfaction of the decree herein.

Determination of the First Application

[5] The law is clear; under Order 22 rule 51(1) of the Civil Procedure Rules:

Any person claiming to be entitled to or to have a legal or equitable interest in the whole 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 parties to the decree-holder, of his objection to the attachment of such property.

The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is *entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?*

[6] The objector’s claim in the two motor vehicle is based on a Hire Purchase Agreement number

1425/SEP2013. It claims it financed the purchase of the two vehicles and the entire purchase has not been paid which retains their ownership in them. The balance according to their books stands at Kshs. 851,000. Section 5(1) of the Hire Purchase Act, Cap 507 laws of Kenya, requires every Hire Purchase Agreement to be registered within 90 days of execution. Section 5(2) of the Hire Purchase Act makes payment of Stamp Duty a precondition to registration of Hire Purchase Agreement under the Act. Payment of Stamp Duty is governed by the Stamp Duty Act and the provisions of the said Act are relevant here as it will become clear sooner. Section 5(4) of the Hire Purchase Act provides that any Hire Purchase Agreement which is not registered is not enforceable against the hirer. Consider the foregoing within section 19(1) of the Stamp Duty Act which provides that instrument chargeable with stamp duty shall not be received in evidence in criminal and civil proceedings unless they are duly stamped under the Act. Hire Purchase Agreement produced in this case by the objector are not registered and are not duly stamped for purposes of Stamp Duty Act. The omissions portend two grave legal effects upon the said Hire Purchase Agreements. One, the Agreement are not enforceable against the hirer, thus, it cannot be used to found an objection proceeding on the basis that the objector is *entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree*. Second, it cannot be tendered in evidence in these proceedings whatsoever let alone to prove that the objector is *entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree*. The foregoing notwithstanding, the log book for KBC 268F shows that the registered owner is the 3rd Defendant and for all purposes, under the Traffic Act, it is the prima facie owner of the said vehicle unless the contrary is proved. The contrary has not been proved. The fact that the registered person in the log book is the 3rd Defendant is a matter of law which the court just takes judicial notice of. This court is not really determining ownership of the subject motor vehicle except that fact is important in this case as it assists the court to determine whether the objector is *entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree*. This fact and the dictate of law on Hire Purchase which has been elaborately discussed above, the objector has not established that it is *entitled to or has a legal or equitable interest in the whole or part of any property attached in execution of a decree*. Therefore, the vehicle is liable to and was properly proclaimed for attachment in execution of the decree in this case. The decision of Kasango J in the case of **Fidelity Commercial Bank Ltd vs. Agritools Ltd & 3 others [2004] eKLR** resonates very well with this case as facts therein bear close resemblance with this case especially on the effect of unregistered hire purchase agreement on a vehicle claimed to be subject of such unregistered Hire Purchase Agreement. The learned judge concluded that in law the vehicle subject of unregistered hire purchase agreement belonged to hirer judgment-debtor and is therefore liable to execution. However, let me state that the objector herein is not without remedy; its remedy would be in damages against the hirer and not in the vehicle herein.

[7] The same fate will befall the objector's claim on motor vehicle KBQ 774R. First, the objector has no any legal or equitable interest based on the fact that the hire purchase agreement has no legal effect for lack of registration as required in law. Second, the objector is not the registered owner, either alone or jointly with the registered owner. Third and this is on a different reasoning, the registered owner according to the log book is SINGH SOKI VARIDER and he is not an objector herein. The circumstances of the case are; the defendant were in possession of and gave out the vehicle to the auctioneers; the registered owner has not objected to the attachment of the said vehicle; therefore, there is no superior claim over the possessory rights of the vehicle by the judgment-debtors herein which has been established. In light thereof, there is no basis on which the court can raise the attachment of the said vehicle. The auctioneer received the said vehicle from voluntary surrender by the judgment-debtor and in the process of execution of the decree of the court in this suit. It shall, therefore, remain liable to and dealt with in execution of the decree herein.

[8] The upshot is that I dismiss the entire objection proceedings by the 1st objector and order execution upon the subject motor vehicles shall proceed according to the law and particularly order 22 of the Civil Procedure Rules. I will not make any order as to costs.

THE SECOND APPLICATION

[9] The second objection application is the one dated 1st September 2014. It seeks the court to raise

attachment levied by Moran Auctioneers on 27th August 2014 for it was unlawful. From the record and submissions by the objectors, they are the parents of judgment debtors and are old. They claim to have been subjected to extreme shame, embarrassment and sordidity of sitting and spending nights in the cold because all their furniture and beddings have been taken away by the auctioneer. They have had to borrow utensils, cutlery and cooking equipment from neighbours because theirs were taken away by the auctioneer. That is not all. Their privacy at home has been invaded and defiled by the acts complained of herein above. The attached goods are their personal properties. They being old have been left defenseless, in inhuman and degrading conditions by the attachment herein. The court should, therefore, come to their defence as a way of protecting the integrity of the judicial process. The items attached are Generator, L.G. 2 door fridge (metallic), Afrigas cylinder, round dining table and 7 chairs, 6 burner-gas cooker and cylinder, blender, small radio cassette-Sanyo, juice maker, microwave-Panasonic, Water dispenser, telephone set, 10 seater leather sifa set, L.G Plasma TV Set, 10 seater antique sofa set, 2 pink seats, one grey couch, one rocking chair, dining table plus 7 pink chairs, antique coffee table glass top plus 4 stools rectangular coffee table, technics 4 pcs music system plus 3 speakers, TV cabinet, kenwood toaster, weighing scale, kenmark TV, B/DECKER eggs mixer, brass Shisver and 2 vases, L.G. plasma TV set 6 plastic chairs and plastic table. The attached items are protected and excluded from attachment under section 44 of the Civil Procedure Act.

[10] The objectors stated that they are not parties in the suit. Their objection is based on their legal and equitable interest in the attached items. They filed affidavits and annexed title documents and domestic package insurance policy and renewal endorsements to support their stated interest in the attached goods. The policy lists all the attached items. They also attached receipts showing these goods are theirs. They accused the attaching creditor and the auctioneer of failing to establish ownership of the goods before attachment. The interested party simply deposed in the affidavit that he pointed out the judgment-debtors which is different from pointing out the judgment-debtors' properties. Although the auctioneer averred in that he served a proclamation on an adult Asian lady on 5th June, 2014, there was no proclamation which was served as required in law. Rule 12 of the Auctioneers Rules requires the proclamation to be served on the judgment debtors or an adult person residing or working in the premises. The question is, therefore, if the proclamation was carried out in the presence of the 1st and 3rd judgment-debtors, was there any need to have another unidentified person to sign the proclamation? Does the Asian female reside or work in the premises? The auctioneer acted inequitably and no mercy should be shown on him. The auctioneer has not proved under section 107 of the Evidence Act that there were valid warrants of attachment after the previous ones expired. The expired warrants were never renewed. And none has been produced in court which means there were no warrants of attachment. The entire attachment was illegal. The auctioneer was negligent. They cited the case of **Garisho C. Odari vs. James Omari & 2 others [2014] eKLR** to support that position. They submitted, in the circumstances, unless the attachment is raised, the objectors will suffer irreparable loss if the goods are sold.

[11] The objectors also attached copy of transfer and tile deed to show the house which the auctioneers visited and attached goods therefrom belong to them and not the judgment-debtors. They cited the case of **Patrick Kingori Warugongo vs. James Nderitu & Another [2014] eKLR** which held that, once the objector has established on a balance of probabilities of his interest in the attached goods, the burden of proof shifts to the auctioneer and the decree-holder to establish that the goods belong to the judgment-debtor and not the objector. They also relied on the case of **Dubai Bank (K) LTD vs. Come-Cons Africa Ltd & Another**. According to them the auctioneer and the decree-holder have not proved the property belongs to the judgment-debtors. The auctioneer was negligent

The objection was opposed

[12] The attaching creditor opposed the objection proceedings by the 2nd objectors. They first took out an objection to the filing of the objection proceedings by Arwa and Associates without first filing a notice of appointment. They submitted, entire proceedings should be struck out on that basis.

[13] On substantive issues, they submitted that the warrants herein were extended on 26th August 2014 and so were obtained properly. The proclamation of 5th June 2014 was sufficient because under rule 12(4) of the Auctioneers Rules, once warrants are extended after the orders of stay has been vacated the auctioneer is not required to issue a fresh proclamation.

[14] They were of the view that the objectors have not established ownership of the attached goods. Also the objectors have admitted that the 1st and 2nd judgment-debtors are their children and live in the same house with them. But the auctioneer had deposed and established that the 1st and 2nd judgment-debtors lived in the subject and the parents lived elsewhere. The 2nd Defendant in an affidavit gave a detailed geographical description of the family set up on the day of the attachment. The judgment-debtors reside in the house where attachment took place. Therefore, the attaching creditor believes these proceedings are just one of the schemes by the judgment-debtors to defeat the execution herein. The initial filings exhibited insurance cover renewal from Canon Insurance Limited which did not have a list of the items insured. But when the attaching creditor responded to the proceedings, they realized they had no evidence of ownership of the items attached and so they subsequently provided a different policy of insurance from Mayfair Insurance Company with a different list of items as well as some few receipts. In any case, there is no connection between the documents provided and the attached items. There is no current search to show they are the owners of the premises herein. However, even if the objectors may be owners of the premises in question, they do not live there. The judgment-debtors do and the items in question were attached from the house where the judgment-debtors live. Regardless of who purchased the items, they were claimed by the 2nd judgment-debtor who gave the two vehicles in lieu of the proclaimed items. In the absence of proper documents of ownership like receipts, invoices, delivery notes and purchase documents, the objection should fail as it was in the cases of 1) **Scanhouse Press Ltd –vs- Times New Servvices Ltd & Another Civil Case No 412 of 2008**; 2) **Charles Muraya Ndegwa –vs- Nahashon Gatere & Another Civil Case No 29 of 2005**; and 3) **Irene Ngombo –vs- Miriam Kedogo & 6 others**. The objectors have refused to answer on the requirement of rule 51(3) of Order 22 of the CPR on the notice to the court and all parties and especially to the judgment debtor because the objectors are the very judgment-debtors.

Determination of the Second Application

[15] These also are objection proceedings and the test is the same one set out under Order 22 rule 51(1) of the CPR. Has the objectors shown on the balance of probabilities that they are *entitled to or have a legal or equitable interest in the whole or part of any property attached in execution of a decree?* But before I determine that ultimate question, there are some matters of preliminary objection which I need to determine in limine. The first one is on validity of the warrants herein. From the record, the extension of the warrants was sought for in a hand-written letter to the court and extended warrants were issued. The warrants are, therefore, proper. Another issue related to this is whether the proclamation of 5th June 2014 was valid and could be proceeded with under rule 12(4) of the Auctioneers Rules to compete execution. Or was there need of fresh proclamation? Rule 12(4) is clear. It deals with situations where a judgment-debtor had obtained orders of stay but which were subsequently vacated as is the case here. I should think that, in such case, if the previous warrants under which the proclamation had been issued were valid, the expiry thereof during the tenure of the order of stay of execution does not invalidate the previous process including proclamation. Proclamation is part of the process of execution and stay order issued after proclamation stays only further execution and does not invalidate the proclamation especially when it is vacated subsequently. Therefore, if the court vacates the stay of execution but does not invalidate the proclamation of property under attachment, execution shall proceed and be finalized without any legal necessity to issue a fresh proclamation. Any practice to the contrary would be objectionable in law.

[16] The other issue is on section 44 of the Civil Procedure Act. The items which are exempt from attachment are wearing apparel, cooking vessels, beds and beddings of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted from. The items which are necessary cooking vessels herein are gas cookers, gas cylinders, blender, juice maker, microwave, bread toaster, and egg mixer and are exempt from attachment; and even before I determine anything else or whether they belong to the judgment-debtor or

the objectors or any other person for that matter, they should be returned forthwith. But the section does not extend to cooking vessels which are merchandise for sale in a warehouse or shop. Auctioneers should always adhere to section 44 of the CPA when carrying out their work to avoid such embarrassments.

Domestic package policy

[17] When the objectors filed the application for objection proceedings, they attached a Renewal Endorsement to a Domestic Package Policy No 01/03/06683/12 taken out by RAIKUNDALIA VINOD CHANDRA J which was effective from 05/12/2013 to 04/12/2014 by Cannon Assurance Limited. According to the objector, that policy was taken out on the attached items and was evidence of ownership of the said properties by the objector. Later, the objector filed a further affidavit sworn on 8th September 2014 and annexed yet another Domestic Package Insurance Policy number 1/01/031/0737/2014 issued by Mayfair Insurance Company Ltd for the period of 5th December 2013 to 4th December 2014. Both insurance covers are by the objector and according to him, are over the attached goods. The further affidavit did not explain the policy annexed in the affidavit in support of the objection application. When things are left unclear by the Applicant, they affect the prospects of the application and tincture the bona fides of the application. I note also that the invoice from Hotpoint is not accompanied by an ETR Receipt which is an important document of ownership. One other thing; the judgment-debtors live in the house where the items were attached and in law as a general rule, ownership of the house does not necessarily extend to ownership of the domestic goods therein because they could as well belong to the tenant. From the evidence before the court, the judgment debtors were present when the goods were proclaimed and they even offered the two vehicles in lieu of the attached goods without raising any queries on the ownership of the vehicles. I have already dealt with the issue of the two vehicles in the first objection application. And based on that fact and the entire circumstances of this case, the auctioneer was not negligent in attaching the goods in question as it has been confirmed by the objectors that the judgment debtors live in the premises in question. This is seen within the general conduct of the judgment debtors which shows they are intent at frustrating the process of execution. The title documents for the premises alone are not enough therefore; there must be ample documentation on ownership of the attached items. All these things have not been sufficiently explained by the objector and one may be tempted to agree with the attaching creditor that these objection proceedings are a scheme by the judgment debtors to defeat the process of execution. But despite these reservations, the court has no forensic foresight on the documents as to doubt them. Except, it is important to note that, where the attaching creditor has doubted documents like they have done here with the insurance policies produced they should subject them to forensic and other authentication examination. The court will not do that for the parties. In the circumstances, I will give the benefit of doubt to the objectors and order return of all the attached household goods to them. The court will not also make any order as to costs in this application because of the mix of things I have discussed above. It is so ordered.

Dated, signed and delivered in court at Nairobi this 26th day of November 2014

F. GIKONYO

JUDGE