



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Suit 7 of 2012**

**NEW NYANZA WHOLESALERS.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MUHAMMED RIZAKA UMAL HAJI.....DEFENDANT/APPLICANT**

**AND**

**AHMED MOHAMMED ALI.....OBJECTOR/APPLICANT**

**RULING**

**INTRODUCTION**

**The application**

[1] I have before me an application dated 11<sup>th</sup> October, 2012 made by way of Notice of Motion under Order 22 rule 51 of the Civil Procedure Rules (hereafter CPR). It is an objection to attachment of motor vehicle registration number KBE 883 V on the grounds that the attachment was wrong and unlawful as the motor vehicle belongs to the Objector.

[2] The judgment-debtor supported the application.

[3] But the Plaintiff [judgment-holder] vehemently opposed the application on the ground of conspiracy between the Objector and the Judgment-debtor to defeat the course of justice and prevent the judgment-holder to realize the fruits of the judgment herein.

**The issues**

[4] By consent of the parties the following were framed as the issues for determination by the court:-

- a) *Whether before the sale of the subject m/v by the J/D to the Objector, the said m/v was a subject of a proclamation in the execution of the decree herein;*
- b) *Whether as at the 18/9/2012 the original log book of the subject m/v was in possession of the J/Creditor, and in what circumstances?*
- c) *Whether there was a proper sale of the subject m/v on 18/9/2012 and whether consideration was paid as per the agreement between the parties thereto; and*

d) Whether the Objector was issued with a log book by the registrar of m/v.

The Objector and the judgment-debtor gave oral evidence and were cross-examined on the above issues.

### **THE COURT RENDERS ITSELF**

#### **Has the original log book of the subject m/v been in possession of the J/Creditor?**

[5] The issue as to how the log book to the subject m/v came into the hands of the judgment-holder was raised by the judgment-debtor in the application dated 1<sup>st</sup> August, 2012 and the court dealt with it in the ruling delivered on 3<sup>rd</sup> October, 2012. The logbook has been in the custody of the judgment-creditor all along and it is not understood why the judgment-debtor did not disclose this fact to the objector. Also from the evidence of the judgment-debtor and the objector, the log book was not delivered on the date of the sale agreement herein but on 25<sup>th</sup> September, 2012. This is also quite contrary to what the agreement says that all relevant documents had been handed over to the purchaser on signing of the agreement i.e. 18<sup>th</sup> September, 2012. That fact leaves a lot to be desired. I observed the demeanor of the objector and the judgment-debtor, and the way they were giving evidence, and was of the opinion that they were not truthful at all in their evidence regarding this issues and the entire transaction of sale of the subject motor vehicle.

#### **Was the judgment-debtor aware of the decree of the court?**

[6] From the record, the judgment-debtor was aware of the judgment of the court against him in this case. Indeed he filed an application dated 1<sup>st</sup> August, 2012 to set aside the *ex parte* judgment entered against him. As at the time of the filing of the said application, the judgment-debtor was aware of the judgment and decree against him herein.

[7] I note the judgment-debtor filed a Notice of Appeal on 9<sup>th</sup> October, 2012 but there is no record of any other or further step having been taken to stay the orders of the court made on 3<sup>rd</sup> August, 2012.

[8] What is startling is that the sale agreement herein was purportedly entered into on 18<sup>th</sup> September, 2012 when the application dated 1<sup>st</sup> August, 2012 was still pending before court. That sale agreement is also not without serious flaws. It talks of the parties having appended their signatures on the 10<sup>th</sup> October, 2012 while below the signatures, the attesting advocate certifies that the parties appeared before him and signed on 18<sup>th</sup> September, 2012. These flaws are telling especially given the circumstances of this case.

#### **Was the m/v subject of a proclamation?**

[9] After perusing the record, and considering the evidence of the judgment-debtor, the objector and the judgment-holder, it is clear that the subject m/v was properly seized upon due proclamation having been issued by Eshikoni Auctioneers in accordance with the law. The m/v was proclaimed on 5<sup>th</sup> July, 2012 and the proclamation was accordingly served on the driver of the motor vehicle that was proclaimed and attached. The judgment-debtor was quite aware of the proclamation. At one point the judgment-debtor would deny knowledge of warrants of attachment and proclamation, and at some other points he would acknowledge knowledge of the proclamation of the subject m/v. In some instances, he could refuse to read some parts of his own affidavit during cross-examination by Mr. Ocharo. I repeat that I observed the demeanor of the judgment-debtor revealed blatant dishonesty. And I am constrained to conclude that instead of addressing the proclamation and attachment within the legal bounds, the judgment-debtor chose the easier option; to "sell" the subject m/v in order to frustrate the execution.

#### **Was the subject motor vehicle available for sale?**

[10] Following my finding that the m/v herein was properly proclaimed and seized, in law, it became the property of the law. Therefore, for as long as it remains entangled in attachment, it was not available for

sale by the judgment-debtor or any other person except by the process of sale within the regime of attachment and sale of attached property under the Civil Procedure Act and rules, and the Auctioneers Act. Such property under attachment by the law, only becomes available to the judgment-debtor either; a) by an order of the court on application or by consent of parties; or b) upon payment of the decretal sum by the judgment-debtor. See the case of **NBI HCCC NO 1818 OF 2000 AT MILIMANI COMMERCIAL COURT NATIONAL INDUSTRIAL CREDIT BANK LTD v MAJANI MINGI SISAL ESTATE LTD & 2 OTHERS**.

**Was the sale on 18<sup>th</sup> September, 2012 valid?**

[11] Accordingly, the purported sale of the subject m/v was not valid and could not pass any title whatsoever. It is therefore null and void for all purposes of this case. The said sale would still have been tainted by the fact that it was entered into in circumstances which tend to a conspiracy to defeat the course of justice by preventing the judgment-holder from enforcing a decree of the court. Such actions by the judgment-debtor are frowned upon by the law as they would dissipate the property under attachment thereby denying the judgment-holder the right to full benefit of the law; the fruits of the judgment in their favour. It is for these kinds of unlawful actions that the law has designed various safe mechanisms, most common being *Mareva Injunctions, Preservation Orders, Conservatory Orders, Restraint Orders, Seizure Orders, Production Orders, Anton Piller Orders* name them. The judgment debtor was aware of the decree herein and the attachment thereto, and looking at all the circumstances and the demeanor of the Judgment-debtor, the purported sale was an attempt to prevent the judgment-holder from realizing the fruits of the judgment herein.

[12] Accordingly, it matters not that the objector paid a consideration or not. The property was under attachment in law and was not available for sale. I observe, but without making any judicial pronouncement that, although there is no statutory restriction, the alleged payment in cash of an amount as huge as Kshs. 3, 000, 000 may be captured in the radar for suspicious transactions especially in today's world where countries have had to put in place anti-money laundering and anti-corruption measures as a way of fighting crime and ensuring security in business sectors through proper management of legitimate financial transactions.

**Is registration by Registrar of motor vehicles absolute ownership?**

[13] According to the Traffic Act, registration in the register of ownership of motor vehicle is *prima facie* proof of ownership. That means the entry in the register is not indefeasible, rather, it is a rebuttable presumption on such factors as conspiracy, fraud or nullity. See the cases of **NBI MILIMANI COMMERCIAL HCCC NO 435 OF 2000 CATHERINE WACHIRA v KENYA COLD STORAGE (FOODS) LTD** and **NBI MILIMANI COMMERCIAL HCCC NO 79 OF 2003 NATIONAL BANK OF KENYA v INNOVATION ADVERTISING LTD & OTHERS**.

### **THE DECISION OF THE COURT**

[14] As the purported sale of the m/v registration number KBE 883V through the agreement dated 18<sup>th</sup> September, 2012 is the basis for these objection proceedings, the court should make such judicial pronouncements as are necessary and incidental to an objection proceeding. For purposes of, and in the context of the process of execution in law, the purported sale of m/v registration number KBE 883V is invalid for the reasons I have pointed out. Consequently, the application dated 11<sup>th</sup> October, 2012 is dismissed with costs to the Plaintiff (judgment-holder). As a result, execution on the attached goods herein should proceed as provided by the law. The objector is at liberty to pursue the judgment-debtor for relief if at all.

**Dated, signed and delivered in open court at Bungoma this 15<sup>th</sup> day of January, 2013.**

**F. GIKONYO**

**JUDGE**

**IN THE PRESENCE OF**

Alusa-court clerk

Onkangi for Ocharo

Onyando for Situma

Onyando for Nanzushi

**F. GIKONYO**

**JUDGE**