



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 156 of 2008

NEW LOOK ESTATE LTD & ANOTHER.....DECREE/HOLDER

VERSUS

KHIRA OMAR MAALIM.....JUDGMENT DEBTOR

AND

BURGER DOME RESTAURANT LTD.....OBJECTOR

R U L I N G

1. The application dated 20th December, 2012 is brought under the auspices of **Order 22 Rule 51** of the Civil Procedure Rules and **Section 28** of the *Civil Procedure Act*. The applicant seeks for a stay of execution of the Decree herein pending the hearing and determination of the instant application. The application is predicated upon the grounds set out on its face and similarly adduced in the supporting Affidavit of **Abdulkadir Moallim Alim** sworn on 18th December, 2012. It is deponed that the Objector, Burger Dome Restaurant, has never been a party to the proceedings and that the property purportedly wrongly attached by the auctioneers belonged to it and not the Judgment Debtor.

2. In objecting to the application, the 1st Defendant and Decree Holder filed Grounds of Opposition dated 1st February, 2013. It relied upon the authority of **Kenya Oil Company Ltd v Fuaad Mahmoud Mohammed & Others H.C.C.C No. 886 of 2002** in support of its objection.

3. At the hearing of the application on 22nd February, 2013, the Objector raised issues concerning compliance with the requirements of **Order 22**, and in particular **Rules 52 and 54** thereof. Mr. Wati, for the Objector, submitted that in the event that the party did not comply with the procedures as set out therein, then **Rule 53** details the circumstances in which the Court would be mandated to issue orders raising the attachment. Further, Mr. Wati submitted that the property purported to be attached belonged to the Objector and referred to annexures marked "AM 2", "AM 3" and "AM 4" of the said Supporting Affidavit showing the Lease, Certificate of Incorporation and Business Licences of the Objector.

4. In response to those depositions, counsel for the 1st Defendant, Mr. Muma stated that it was the Objector who had failed to comply with the Rules under **Order 22** with regard to the service of the Notice of Objection. It was his contention that had the necessary notice been served, it would have been incumbent upon the 1st Defendant to act accordingly and comply with the provisions of **Order 22 Rules 51 and 52**. It was also counsel's contention that the Objector had to demonstrate a legal or equitable interest in the property for which the attachment is objected, which the Objector had failed to

demonstrate.

5. The application was made on 20th December, 2012, which was preceded by the Notice of Objection dated 18th December, 2012. There is however, no affidavit of service on the Court file to establish whether or not the Notice was served upon the Defendants and the Decree Holder. There is no provision under **Order 22** for the Notice to be replied to first by the attaching creditor intimating as to whether it intends to proceed with the execution or not (as intimated by learned counsel Mr. Muma). The practice is that both the Notice and the application for stay, contemporaneously filed, are to be served upon the Respondents and subsequently response thereto should be made.

6. In this case, the Objector did not serve the required Notice upon the Decree Holder and the Defendants. In the Affidavit of Service of the process server, John Mburu Nganga sworn on 18th February, 2013, he deponed to the fact that he had received the application dated 20th December, 2012 and the Hearing Notice for the same but did not indicate as to whether he served the Notice of Objection.

7. Procedural rules are the backbone of justice, as was reiterated by Maraga, J in **Shashikant C. Patel v Oriental Commercial Bank [2005] eKLR** in which he held *inter alia*;

“...we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice.”

This was similar to the position adopted by Muriithi, J in **Inland Beach Enterprises Ltd v Sammy Chege & 15 Others [2012] eKLR** where he held, *inter alia*:

“...in my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings.”

8. The Objector herein filed its application without following the pre-requisites as set out under the rules of **Order 22. Rule 51 sub-rule (1)** which reads:

“(1) Any person claiming to be entitled to or 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 the sale of such property give notice in writing to the Court and to all parties and to the decree holder of his objection to the attachment of such property. (underling mine).

The remedy which the Objector seeks is an equitable remedy, which the Court has the discretion to whether to grant or not. However, in deliberating on such matters, the parties must also be seen to have acted equitably for the Court to grant such orders. The Objector in this instance failed to adhere to the laid down procedure that it now claims the 1st Defendant did not comply with. The necessity to serve the Notice of Objection is clearly set out under **Order 22 Rule 51**. The Objector has to notify all parties, (the decree holder and the Court), notifying them of his intention to object to the attachment. However, the Court is empowered under **Section 3A** of the *Civil Procedure Act* and **Article 159 (2) (d)** of the Constitution to **‘administer justice without undue regard to procedural technicalities’**. The issuance of the Notice of Objection under **Order 22 Rule 51 (1)** is not laid down or expressed in mandatory terms and thus the Court, in exercising its inherent powers, may allow for the application to be determined on its merits rather than be dismissed on technicalities as to procedure.

9. Under **Order 22 Rule 51 (1)**, the Objector has to show its interest, legal or equitable in the property, in making its application. The Objector herein has attached to the application, annexures showing its Lease and business licenses. The issue of the Lease and business licences is not in contention. However, what is in dispute is the ownership of the property for attachment as set out in the Proclamation of Attachment dated 14th December, 2012. In **Kenya Oil Company Ltd** (supra) the Court determined that a party in such proceedings has to establish and demonstrate a legal and equitable interest in the attached

property. At page 7, Ringera, J (as he then was) held, *inter alia*;

“... Having done so, I feel constrained to reiterate that the burden of proof is on the objector to establish a legal or equitable interest in the property subject matter of the execution objected to. The burden is to be discharged on a balance of probability.”

The learned judge went further to determine that;

“The said goods are not mentioned in the lease agreement as belonging to him – and he has not annexed any documentary evidence to show they belong to him.”

10. To my mind, the documents adduced by the Objector do not establish that it has any legal or equitable interest in the property attached. As was held in **Kenya Oil Co. Ltd** (supra), the onus is upon the Objector to prove that the attached property belongs to him. The Objector, therefore, having failed to establish ownership and interest in the property attached, I find no merit in the Objectors application. Accordingly, I dismiss the same with costs to the Decree Holder.

DATED and delivered at Nairobi this 30th day of April, 2013.

**J. B. HAVELOCK
JUDGE**