



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY
CIVIL CASE NO. 358 OF 2011

MARY WANJIKU GAKURU PLAINTIFF/RESPONDENT

VERSUS

SWARA HYBRID LTD. DEFENDANT

AND

ROYAL GARDENS LTD. OBJECTOR/APPLICANT

RULING

1. The Objector herein, Royal Gardens Ltd., filed a Notice of Motion dated 27 July 2012 in which it prayed for a stay of execution of the Decree covering the sale of its goods pending the hearing of its Application and that the attachment of its goods be lifted/raised. The Application was brought under the provisions of **Order 22 rule 51 (2)** of the *Civil Procedure Rules, 2010*. The grounds upon which the Application was based are as hereunder:

“1. The Objector/applicant is the owner of all the goods, movable and immovable situated on land parcel Plot No. Kiine/Sagana/388/179 to the exclusion of anybody else.

2. The objector/applicant does not owe the plaintiff/respondent any money at all.

3. No proclamation has ever been carried out on the Objector’s/applicant’s goods.

4. The Objector/applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

5. **Any sale of the objector's/applicant's goods will occasion it great prejudice and loss.**

6. **It is only fair and just that the orders sought be granted”.**

2. The Application of the Objector was supported by the affidavit of its Managing Director one **Francis Kihonge Nganga** sworn on 27 July 2012. The deponent noted that he had seen an advertisement in the Daily Nation newspaper of the 25 July 2012 for auction sale to sell what he termed “my property”. He went on to say that the Objector is the lawful owner of all that parcel of land known as a plot No. Kiine/Sagana/388/179. He detailed that the Objector had bought the property on first of November 2011 from Midland Millers Ltd who were the registered owners thereof. He attached a copy of the Agreement for Sale as well as the Transfer and a copy of the Certificate of Title for the property. The matter came up before me on the 30 July 2012 under Certificate of Urgency and I ordered that there be a stay of execution of the Decree pending the hearing of the Application *inter-partes*.

3. The Plaintiff swore a Replying Affidavit on 27 September 2012. She maintained that the Defendant, Swara Hybrid Ltd had at all material times been in possession of what she termed the “Milling Plant” in Sagana town and she had delivered maize there and collected payment for such deliveries. The said Midland Millers Ltd referred to in the Objector's Supporting Affidavit had not carried on any milling business in the same premises. The Plaintiff maintained that after service of summons herein, a number of intermediaries approached her to ask to give the Defendant time to find a buyer for the Milling Plant in order to pay off its debts including that of the Plaintiff. She noted that the Defendant herein had been operating the Milling Plant although the property was registered in the name of Midland Millers Ltd, a related company with common shareholders and directors. She maintained that the Defendant's movable property was proclaimed for sale under the Decree herein, on 22 June 2012 but in an attempt to defeat the attachment and settlement of the decretal amount, the Defendant had purported, in liaison with Midland Millers Ltd, to transfer the premises and Milling Plant to the Objector. The Plaintiff had been advised by her advocates on record that the property being transferred to the Objector was agricultural land and that the said transfer was void for the reason that no Land Control Board consent had been obtained to the transaction. Further, the Plaintiff raised a query as to why, when the Agreement for Sale detailed completion in 90 days, the transaction had been rushed through barely 3 weeks after the Agreement for Sale had been executed. She also maintained that if the Objector was an actual and genuine purchaser, it should have provided proof of payment by way of annexure to the Supporting Affidavit of the Application.

4. To challenge the Replying Affidavit of the Plaintiff, the Objector filed a Supplementary Affidavit again sworn by Mr. Nganga on 18 October 2012. The deponent denied that the Defendant herein had ever been in possession of the Milling Plant as alleged by the Plaintiff. The Milling Plant was and always had been the property of Midland Millers Ltd who had sold it to the Objector. Mr. Nganga also denied that the sale and transfer of the suit property to his company had been done to defeat this suit or justice. At the time when the Objector purchased the suit property, it was not aware that the suit was in existence. He commented that, as could be seen from the Schedule to the Agreement for Sale attached to the Affidavit in support of the Application, the Objector had purchased not only the land but also the machinery thereon. He then attached copies of the application for Sagana Town Council consent as well as the Kenya Revenue Authority receipt for the Stamp Duty paid on the Transfer of the Lease from Midland Millers Ltd to the Objector, dated 9 December 2011 in the amount of Shs. 460,040/-. The deponent admitted that the completion period in the Agreement for Sale had been detailed at 90 days but there was no need to sit and wait for that time after the full purchase price had been paid. He denied that the Transfer of Lease as between Midland Millers Ltd and the Objector Company had been rushed in any way.

5. The Objector filed its written submissions herein on 18 February 2013. It opened the same by detailing that it was the sole owner of all of the movable and immovable goods situated on the suit premises. It referred to the said Agreement of Sale annexed to the Affidavit in support of the Application the same being dated 15 November 2011. Upon the signing of the same, the Objector paid the full purchase price of Shs. 23,000,000/-and the rights and interests of Midland Millers Ltd were thereby extinguished. The Objector referred to page 8 of the said Agreement for Sale which clearly showed what

was bought and sold by the parties thereto. There was never any objection to the sale. It maintained that it was a complete stranger to both the Plaintiff and the Defendant herein. It followed that the auctioneers, employed by the Plaintiff, had attached property belonging to an entity which was not a party to the suit and a complete stranger. The Objector also maintained that the auctioneer clearly violated the provisions of the Auctioneers Act and **Order 22** of the *Civil Procedure Rules* by failing to proclaim the suit property before advertising it for sale. Finally, the Objector noted that it had paid the Stamp Duty on the Transfer of Lease and had also complied with the provisions of **section 4** of the *Chattels Transfer Act*.

6. The Plaintiff's submissions were filed herein on 27 February 2013. After detailing the Application before court and a brief background as to the proceedings before this Court, the Plaintiff detailed what she termed several attempts by the Defendant and the Objector to frustrate the settlement of her claim which she detailed as follows:

“i) The Defendant in connivance with Midland Millers Limited has purported to transfer the land and machinery to the Objector, but only the land was transferred in December 2011.

ii) Despite the purported sale, the Defendant and Midland Millers Limited in a bid to assist the Defendant from paying its debts advertised the Milling Plant and land for sale on 18th July 2012 and 29th August 2012 through Leakeys Auctioneers.

iii) The Objector did not object to the intended sales on 3rd August 2012 and 12th September 2012, which confirms the lack of bonafides on the part of the Objector”.

7. Thereafter and with regard to the Objection proceedings, the Plaintiff maintained that the Objector needed to prove that it had a legal or equitable interest in the property that had been attached in satisfaction of a Decree. She quoted the observations of my learned brother Waweru J. in the case of **Akiba Bank Ltd v. Jetha & Sons Ltd (2005) eKLR** as follows:

“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 a decree.”

It was the Purchaser's submission that the Objector had not exhibited any such evidence to prove that it had either a legal or equitable interest in the assets proclaimed and attached by the auctioneers on 22 June 2012. She also maintained that the Objector had not controverted the fact that the Defendant was carrying on business on the parcel of land which was registered in the name of Midland Millers Ltd. The Purchaser in referring to the said Agreement for Sale noted that the said Midland Millers Ltd purported to transfer the land and machinery but excluded the Milling business and any liabilities arising therefrom, including the liability to her.

8. The Plaintiff then referred the court to the case of **Colour Print Ltd v. Pre-Press Production (2005) eKLR** as per **Njagi J.** That was a case involving a facade company in which the objector in execution proceedings was clearly a facade for the judgement debtor. The Plaintiff submitted that the Objector herein was clearly a facade company for the Defendant or indeed Midland Millers Ltd. It also maintained that the transaction of the transfer of the suit land to the Objector was void because the same lacked Land Control Board consent under the provisions of the Land Control Act (**section 6 (1)**) in that the suit property was agricultural land. Similarly, the Plaintiff maintained that the purported sale of the Milling Plant between Midland Millers Ltd and the Objector was also void, in breach of **section 13 (1) and 14** of the *Chattels Transfer Act* in that the Agreement for Sale dated 15 November 2011 had not been registered as required by **section 6 (1)** of the said *Chattels Transfer Act*. The Plaintiff submitted that the attachment of the Milling Plant and the office movables was proper and valid and that the Objector's application was without any merit.

9. I have thoroughly perused the Agreement for Sale dated 15 November 2011 as between Midland Millers Ltd and the Objector Company. The preamble to the same quite clearly states that the said Midland Millers Ltd was the vendor of all that piece of land known as Title No. Kiine/Sagana/388/179 as well as it owning some old milling machinery namely Buller Miag make of 1975 situate and affixed to

the piece of land. It goes on to say that the vendor was carrying out a milling business on the said piece of land. In the definition clause 1.1 of the said Agreement it defines “Property” which was being sold under the same. The definition reads:

“Property’ means the said piece of land and the machinery as more particularly described in the Schedule (including all the buildings, improvements, fixtures and fittings situated thereon);”

Then the Schedule under the heading Particulars of the Property reads:

“ALL THAT piece or parcel of land situated within Sagana Township being the premises comprised in the certificate of lease for Title No. Kiine/Sagana/388/179 held by the Vendor, which land parcel together with the developments and buildings erected and being thereon together with some old milling machinery, Buller Miag make of 1975, situate and affixed to the said piece of land.”

Further, clause 2.2 of the said Agreement details that the interest sold is the “residual” of the leasehold interest in the said land for a period of 99 years from 1st May, 1976, together with the machinery situate and affixed to the property.

10. I am not sure whether the said Agreement could be any clearer. It is quite obvious to me that what was sold to the Objector by Midland Millers Ltd is not only the land but also the milling machinery situate and affixed to the said piece of land. The Purchaser has attempted to attack the Objector’s application before court on a number of grounds: firstly, that it must exhibit evidence of its legal or equitable interest in the whole or part of any property attached in execution of the Decree herein. Looking at the Proclamation form exhibited as “MWG 1” to the Plaintiff’s Replying Affidavit dated 27 September 2012, the auctioneers, Kiriiyu Merchants, duly instructed by the Plaintiff, detailed on the schedule of immovable property, one Milling Machine which they valued at Shs. 5 million. The auctioneers also detailed a number of other movables including office chairs and desks and other attachable assets. In this connection, I am of the belief that the Milling Machine should not have been proclaimed as the auctioneer’s had no evidence of ownership at the date of the Proclamation.

11. I am satisfied of the genuineness of the said Agreement for Sale dated 15 November 2011. I am also satisfied that the suit property was transferred to the Objector on 9 December 2011 as per the Certificate of Lease dated that day, issued out of the Kirinyaga District Land Registry. I do not consider that the Objector is in any way a facade company for the Defendant/Judgement Debtor nor indeed for Midland Millers Ltd. The Plaintiff has produced no evidence before court to show this whether by way of extract from the Companies Registry of the Objector company’s file or otherwise. Similarly, I do not see the relevance of the submission that the said Agreement for Sale was void for want of Land Control Board consent. If one examines the advertisements taken out in the local press by the two firms of auctioneers in respect of the suit property it is referred to as “Prime Commercial Property within Sagana Town”. The Plaintiff has brought no evidence before this court that the suit property was agricultural land and consequently required Land Control Board consent. As the suit property was situate within the Sagana Township, I would have expected that the only consent required to transfer would have emanated from the Town Council of Sagana as per Exhibit “FKN 1” annexed to the Supplementary Affidavit of the said Mr. Nganga dated 18 October 2012. I am also satisfied from Exhibit “FKN 3” that Stamp Duty has been paid on the land transfer to the Objector in the amount of Shs.460,040.00.

12. As a result, I reject the Plaintiff’s submission that the Transfer of the suit premises to the Objector was void for non-payment of Stamp Duty. Further, I have carefully perused **sections 13 (1) (c) and 14** of the *Chattels Transfer Act*. With due respect, the Plaintiff is not captured by those sections even though the said Agreement for Sale dated 15 November 2011 may not have been registered under **section 6 (1)** of the *Chattels Transfer Act*. All in all therefore, I find that the Milling Plant was properly purchased by the Objector from Midland Millers Ltd. I have perused Exhibit “FKN 2” again annexed to the Supplementary Affidavit of Mr. Nganga and am satisfied from the documents comprising that Exhibit that the full purchase price of Shs. 23,000,000/-was paid by the Objector to Midland Millers Ltd. To this end, I have no doubt that the Objector was the lawful owner of the Milling Plant attached to the suit property.

13. The outcome of all the above is that I uphold the Objector's Notice of Motion dated 27 July 2012. I raise the attachment in respect of the Objector's goods situate and affixed on land parcel No. Kiine/Sagana/388/179. Those goods comprise what the Objector purchased as per the said Agreement for Sale dated 15 November 2011 being the milling machinery namely Buller Miag, make of 1975. I do not lift the Plaintiff's attachment in respect of office chairs, desks and other movable assets. The Objector will have the costs of its Application.

DATED and delivered at Nairobi this 23rd day of May, 2013.

**J. B. HAVELOCK
JUDGE**