



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO.315 OF 2009

GEMINIA INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

SEDCO CONSULTANTS LIMITED.....DEFENDANT

AND

NATIONAL INDUSTRIAL CREDIT BANK LTDOBJECTOR

RULING

1. The Plaintiff and the Defendant entered into a consent on 16th April, 2010 whereby Judgment was entered for the Plaintiff against the Defendant for Kshs.8,283,893/12. Later the Defendant unsuccessfully to set aside or vary the same. The Plaintiff levied execution and attach Motor Vehicle Registration number KBK 313J (hereinafter “the Motor Vehicle”). Upon attachment, the Objector filed a motion on notice dated 26th March, 2013 under Order 22 Rule 51 (2) and Order 51 Rule 1 of the Civil Procedure Rules objecting to the attachment of the motor vehicle. The grounds in support of the application were set out on the face of the application and the Affidavit of Henry Maina sworn on 27th March, 2013.
2. It was contended for the Objector that the Objector and the Defendant entered into a Hire Purchase Agreement dated 11th December 2009, whereby the Defendant agreed to take Motor Vehicle Registration number KBK 313J under the terms of the said Agreement, that the said Motor Vehicle was subsequently registered in the joint names of both the Objector and the Defendant. That the Judgment Debtor/Defendant was still indebted to the Objector as it was yet to repay the hire purchase price in full and that therefore the Objector was still the Owner of the Motor Vehicle. The Objector contended that the firm of Galaxy Auctioneers served a proclamation of attachment of moveable property dated 13th March, 2013 wherein the subject motor vehicle was listed. That further, the Objector was yet to receive a notice from the decree holder barring the transfer of the subject motor vehicle to a third party. That in the premises, the said motor vehicle was unavailable for attachment by way of seizure since the same was in the joint names of the Objector and the Judgment Debtor.
3. The Plaintiff opposed the application through grounds of opposition dated 4th April 2013 and a Replying Affidavit of Mildred Wamaya sworn on 5th April 2013. The Plaintiff contended that the Application was an abuse of the Court process as the Objector had no legal basis to approach this Court as a co-registered owner since the Chattel’s Mortgage was not registered, that the provisions of Section 4 of

the Chattel's Transfer Act Cap 28 Laws was clear that the Objector could not enforce the unregistered Chattel's Mortgage. The Plaintiff was of the opinion that the Objector cannot stop the execution of a decree as the Defendant was under the duty to indemnify the Judgment Debtor. The Plaintiff further undertook to pay the Objector the outstanding sum of Kshs. 54,000/=, as deduced from the Objector's annexures, after the satisfaction of its claim against the Defendant. The Plaintiff therefore urged the Court to dismiss the application with costs.

4. I have considered the affidavits on record and the submissions of Counsel. I have also considered the various authorities relied on by the respective counsel. In order for the Objector to succeed in this application it has to satisfy the requirements of the law under which it has come to court. From the reading of Order 22 Rule 57 an Objector has to establish a legal or an equitable interest in the whole or part of any property that has been attached in execution of a decree. Thus, where any objection is made on the ground that such property is not liable to attachment, as it is the case here, the Court has to investigate the claim to establish the same. The burden is therefore on the objector to adduce evidence to show that as at the date of the attachment, it had some interest in the property attached.

5. It is the Objector's case that it is a Joint Owner of the Motor Vehicle pursuant to a Hire Purchase Agreement dated 11th December 2009. Mr. Shiwaji, Counsel for the Objector submitted that the Defendant/Judgment Debtor was still indebted to the Objector in the sum of Kshs.2,116,023/= and not the sum of Kshs.54,000/= averred to by the Plaintiff. That the objection was based on a Hire Purchase Agreement and not a Chattels Mortgage as the Judgment Creditor had claimed. That in the premises, the Motor vehicle remained the property of the Objector. The Objector also submitted that the Judgment Holder under Order 22 Rule 41 of the Civil Procedure Rules should not have levied attachment on the Motor Vehicle as the same was jointly owned, but should have sent a Notice to the Judgment Debtor to prohibit him from transferring his share or interest in the Motor Vehicle.

6. On the other hand, the Plaintiff submitted that the Hire Purchase Agreement on record was not binding as the same was not registered given the mandatory terms of Section 4 of the Chattels Transfer Act. That the statements annexed to the Objector's Application indicated that the amount outstanding was Kshs.54,000/= viz-a viz the Judgment Debt of Kshs.3,000,000/=. That in the premises, the Motor Vehicle could be sold by the Plaintiff/Judgment Holder and part of the proceeds of sale could be used to offset the Objector's outstanding balance or deposited in court.

7. A close scrutiny of the Hire Purchase Agreement would show that the Defendant was financed by the Objector to a tune of Kshs.1,112,000/= for the purchase of the Motor Vehicle. It is clear from the record that the agreement between the Defendant and the Objector is a Hire Purchase Agreement and not a Chattels Mortgage as contended by the Plaintiff. This is because a Chattels Mortgage is supposed to be in the prescribed form as provided for by the Chattels Transfer Act Cap. 28 Laws of Kenya. This is not the case in this instance. Further, the Agreement before Court clearly states that the same is a Hire Purchase Agreement and contains terms and conditions that are akin to such Agreements. That notwithstanding, I do note that there is no evidence on record to show that the Hire Purchase Agreement was ever registered as required by Section 5 of the Hire Purchase Act Cap. 507. No certificate of registration has been provided to evidence such registration. Section 5 of the said Act provides that:-

“Every hire-purchase agreement shall be delivered for registration to the registrar within thirty days after its execution.....On registration of a hire-purchase agreement, the registrar shall deliver to the owner a certificate of registration, and a certificate of registration purporting to be given under the hand of the registrar shall be prima facie proof of the facts therein certified in any proceedings.”

8. In my view, the effect of such provision is that a Hire Purchase Agreement that is not registered cannot be taken to be proof of the facts therein in any proceedings. In this regard, I am of the view that the Hire Purchase Agreement between the objector and the Defendant having not been registered, this court cannot take cognizance of it. Accordingly, the document produced as “H1” is of no consequences in these proceedings.

9. I will now consider the other evidence relied on by the objector in proof of its case. I have seen the

Registration Book of the Motor Vehicle issued by the Kenya Revenue Authority. The same is dated 21st December, 2009 at the time the motor vehicle was first registered. It shows that the motor vehicle is registered in the joint names of the Objector and the Defendant. It is clear therefore, that as at that date, the motor vehicle was jointly owned by the Defendant and Objector. It is for this reason that the Objector submitted that the Decree Holder should have complied with Order 22 Rule 41 which states that:-

“Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.”
(Emphasis mine)

10. That notwithstanding however, there is no evidence on record to show that the Decree holder was aware of the joint ownership of the motor vehicle as at the time of attachment. It cannot therefore be held that the attachment was irregular and that Order 22 Rule 41 of the Civil Procedure Rules is applicable. I hold so because, whilst the logbook is clear that the motor vehicle was registered in the joint names of the objector and the Defendant as at 21st December, 2009, there is no evidence that it was so registered in February, 2013 when it was attached. This court is hesitant to presume that because the log book is shown to have had the names of both the Judgment Debtor and the Objector as at December, 2009, that that would be the position in February, 2013. In my view, it was incumbent upon the Objector to show that the registration particulars of the motor vehicle as at February, 2013, were the same as in December, 2009. That would have been possible by the production of a copy of the records from the registrar of motor vehicles. This the objector did not do and the court cannot assume or speculate on it.

11. One other thing is the Objectors assertion that there were monies still outstanding on the Hire Purchase of the motor vehicle. The Objector produced in Exhibit “AO3” statements of account to buttress its argument. Indeed counsel for the Objector was categorical in his submissions that the actual amount outstanding was Kshs.2,116,023/39.

12. I have carefully considered Exhibit “AO3”. The same shows that they are statement for six (6) different accounts or contracts as follows:-

- a. Contract No. AA122440C6PR dated 01/09/12 for Kshs.950,459/07
- b. Contract No. AA1224446G7M dated 1/09/2012 for Kshs.469,900/47.
- c. AA12244G4BZB dated 01/09/2012 for Kshs._____ not shown.
- d. AA12244VJHBG dated 01/09/2013 for Ksh.211,202/72.
- e. AA12248FQ79 dated 04/09/2012 for Kshs.2,466,109/-
- f. AA12271F9JKZ dated 27/09/2012 for Kshs.60,059/-

From exhibit “AO1”, which is the Hire Purchase Agreement which the objector sought to rely on, it is clear that the contract for the subject motor vehicle was contract No. 12481 dated 11th December, 2009. None of the accounts exhibited as “AO3”, which I have set out above relate to the subject motor vehicle as all those accounts relate to contracts entered into in or about September, 2012!

13. That being the case, has the Objector discharged its burden. The burden of proof always lies on the claimant. He who alleges must prove. The evidence relied on by the objector in my view does not show that as at February, 2013 when the subject motor vehicle was attached, the same was registered in the joint names of the objector and Judgment debtor. The attempt to show that there were monies outstanding on the hire of the said motor vehicle is but a fraud. The same is misleading as I have shown above. The question that arises is why did the objector attempt to mislead this court as to the amount allegedly outstanding? Only the objector can tell.

14. On the part of this court, I am not satisfied that the Objector has properly established its claim to the subject motor vehicle on a balance of probability as required by law. Accordingly, I dismiss the application dated 26th March, 2013 with costs to the Decree holder.

DATED and **DELIVERED** at Nairobi this 14th day of June, 2013.

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A. MABEYA

JUDGE