



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 89 OF 2003

MICHAEL SIMIYU SIBA.....PLAINTIFF/DECREE HOLDER

VERSUS

ABSALOM WALIAULA MUKHWANADEFT/JUDGMENT DEBTOR

AND

ROSEMARY N. MUKHWANA..... OBJECTOR/APPLICANT

RULING

The ruling is in respect to an objection application filed in court on 5th June 2013. The motion is brought under Order 22 Rule 51 and 52 of the Civil Procedure Rules seeking;

1. There be a temporary stay of sale of movable property attached by **BETICO AUCTIONEERS** pending hearing and determination of the application interpartes.
2. The unlawful and irregular attachment be lifted forthwith and the property attached and held by BETICO AUCTIONEERS be released to the objector Rosemary Nakhumicha Mukhwana and be taken back by the auctioneers unconditionally to the objector's home
3. Costs be provided for.

The application is premised on the grounds on the face of it and on the supporting affidavit by the applicant. Annexed to the affidavit was a letter from area assistant chief and village elder confirming the attached animals belonged to the objector.

The application is opposed. The Respondent/decree holder filed a replying affidavit on 12th June 2013. This court got informed through a letter from his advocate dated 22nd July that he passed on on 7th July 2013 when this application was pending. The counsel said he could not file written submissions as his client was deceased. This was after the date for ruling had been given.

Although the respondent/decree holder is deceased, the execution process had been commenced by him. It is only fair to the objector for the ruling to be made on the pending application. The goods attached were animals and leaving them in the hands of the auctioneers pending taking out of the letters of administration in respect of the deceased will not be proper.

In the replying affidavit, at paragraph 9 the Respondent stated that the objector is a relative of the defendant/judgment debtor. The respondent further says the objector does not own all the attached properties except she is working in cahoots with the Judgment debtor to defeat justice. This in my view means the respondent admit some of the cows belong to the objector. He does not however state how many.

At paragraph 13, he says the assistant chief and village elder are biased even when he was evicting the judgment-debtor from the suit parcel and their letters are meant to mislead the court. He does not however explain the nature of or why the bias against him by the provincial administration, i.e what they did or did not do.

Mr. Onchiri raised a preliminary objection that the application violated the provisions of Order 22 Rule 51 (2) of the Civil Procedure Rules. He says further that the annexures violates the provisions of section 6 and rule 9 of the Oaths and Statutory Declarations Act Cap 15. He did not explain the nature of the objection as he opted not to submit. I will not go into fishing expedition to dig the intentions of the Respondent as regards the content of their objections. The Respondent averred at paragraph 16 that the animals were sold upon the expiry of 72 hours. He therefore opposed the prayers sought by the objector.

It is not in dispute that the animals were attached/carried away on 31st May 2013. On the same day the objector filed notice under Order 22 Rule 51. On 3rd June 2013, the Deputy Registrar of the High Court issued a notice to the decree holder as required under Order 22 Rule 52. The auctioneers wrote to the court and enclosed was a hand bill advertising the public auction to take place on 3rd June 2013 at 10.00 a.m.

The auctioneer was served with the notice to attaching creditor at 3.51 p.m on 3rd June 2013 as per stamp on it. On the auctioneers letter dated 4th June 2013 and received in court on 13th June 2013, the public auction is stated to have taken place on 4th June. I have perused the file and there is no proof that the auctioneer was served with an order for stay of execution. In the absence of service of the order of stay, the auctioneers were within the law to sell the animals within 72 hours.

I do find that the evidence availed from the pleadings clearly indicate the animals belonged to the objector. She made a mistake in not serving the auctioneers with the order of stay in time. The cows can be released to her if they are still in the custody of the auctioneers. If they were sold, her remedy lies therefore against the estate of Michael Simiyu Siba – deceased for wrongful attachment. Consequently I allow the application in part that the attachment was unlawful. The cows released to be transported back at the objector's expense. Since the decree-holder pre-deceased this ruling, i order each party to bear their own costs.

RULING DATED, DELIVERED AND SIGNED In open court this 29th day of August 2013.

A. OMOLLO

JUDGE