



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 561 OF 2011

EQUITORIAL COMMERCIAL BANK LTD... PLAINTIFF/DECREE HOLDER

VERSUS

BUBACON AGENCIES LTD. JUDGMENT DEBTOR

ABDULRAHI M. ALI 2ND DEFENDANT

JABIR HAJI ALI 3RD DEFENDANT

AND

MEYMUNA KASSIM OBJECTOR

R U L I N G

1. The matter before this Court is the Objector's Notice of Motion dated 20th September 2013. It seeks Orders that the Proclamation dated 3rd September 2013 and/or any attachment issued herein be raised and/or lifted and that the Plaintiff/Decree Holder do bear the costs of such attachment. It also seeks a stay of execution pending the hearing and determination of the Application. The same is brought under the provisions of **Order 51 (1), Order 22 rule 51 (2)** of the *Civil Procedure Rules* as well as **sections 1A, 1B, 3A and 37 (2)** of the *Civil Procedure Act*. It is also brought under the provisions of the *Auctioneers Act (Cap 5 of 1996)* and **Rule 12 (b)** of the *Auctioneers Rules*. **Order 22 rule 51 (2)** reads:

“(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.”

2. The Application is supported by the Affidavit of the Objector sworn on 20th September 2013 as well as on the following grounds:

“1. THAT the execution by way of Proclamation is illegal and unlawful as it purports to execute the movable goods and properties legally owned by the Objector who have

nothing to do with the suit.

2. THAT the intended execution is ill motivated and made in bad faith without establishing the real ownership of the properties intended for proclamation.

3. THAT the properties to be attached are the properties of the Objector and the Judgment Debtor has nothing to do with it.

4. THAT the Objector stand to be gravely prejudiced by the Proclamation and any consequent attachment of her personal assets as the Objector stands to lose over Kenya Shillings Thirteen Million, Six Hundred and Eighty Two Thousand Eight Hundred and Sixty and Eighty Cents (Kshs.13,682,860.80).

5. THAT it is only fair that the Proclamation be raised and/or lifted”.

3. The Supporting Affidavit of the Objector maintained that the Decree Holder herein, its servants and agents but more particularly Bealine Kenya Auctioneers proclaimed her household goods without endeavouring to ascertain the ownership thereof, in complete disregard of the law and the Auctioneers Rules. She maintained that the premises at which the said Auctioneers proclaimed the household goods, being L. R. No. 209/10722/50, Nairobi, belonged to her and that she resided there together with her family. She emphasised that the Judgement Debtor had no interest whatsoever in either the property or the household goods and they were not even a tenant or lessee of the same. She attached a copy of the Certificate of Title for the property being I. R. No. 50492 which clearly showed that the property had been transferred to her on 18th March 1991 for a consideration of Shs. 800,000/-.
4. In response, the legal officer of the Plaintiff bank, **Brian Asin** swore a Replying Affidavit on 30th September 2013. He attached to his said Affidavit, 2 Reports of Investigation from Chambers Investigators & Assessors dated 1st July 2011 and 16th September 2011 respectively. The deponent observed that the Objector was a director of the First Judgement Debtor Company and that she lived in the same house as the Second Judgement Debtor. He further maintained that the Objector had provided no evidence that the goods that were proclaimed and attached were hers. She had only relied on the allegation that she owned the premises where the goods were proclaimed to prove ownership of the same. In the deponent's view ownership of premises is totally distinct from ownership of goods and the ownership of the latter must be strictly proved. Mr. Asin also noted that upon the proclamation, the Second Judgement Debtor resurfaced and made a proposal to the Decree Holder as regards to the payment of the outstanding debt. As such, he maintained that it was obvious that the Objector was working in cahoots with the Second Judgement Debtor in order to defeat justice.
5. With the leave of the Court, the Objector swore and filed a Supplementary Affidavit dated 9th October 2013. She reaffirmed that the attached goods belonged to her and that none of the Judgement Debtors had any interest in the same. She was not a party to the proceedings before this Court which had given rise to the Judgement in the matter. She had been a director of the 1st Judgement Debtor Company but had resigned in 2006 and, since then, had never had any dealings with the company. As regards the suggestion made by Mr. Asin that she had to prove that she owned the household goods that had been attached, the Objector noted that they were old and that it would be difficult for her to trace the receipts for monies paid for most of them because of the lapse of time. She further went on to say that if the Decree Holder/Executive Creditor was to be allowed to proceed with the execution, then it was upon it to prove that the attached goods belonged to the Judgement Debtors or that they had a substantial interest therein or that such belonged to them. She concluded by stating that as far as she was concerned, the said Auctioneers were trespassers on her premises and that this Court should declare them as such.
6. The Objector's written submissions were filed herein on 24th October 2013. She maintained that her Application was based on the following main grounds:

“a) THAT the Proclaimed goods belonged to the Objector and none of the Judgement Debtors herein have any interest in the said goods.

b) THAT the attachment is illegal and unlawful as the Objector is not a party to the case.

c) THAT the Auctioneers were duty bound to establish the ownership of the goods before Attachment.

d) THAT none of the Judgement Debtors herein is a tenant, lessee or a lodger in the premises where the goods were proclaimed etc.”

The Objector noted that the premises were a residential house in which she resided with her family. The attached goods were mainly household goods and belonged to her to the exclusion of any other person. As regards the motor vehicle which had been attached, she did not have a motor vehicle in her compound neither did she know the whereabouts or the owner of the motor vehicle proclaimed. As far as she was concerned, the auctioneer could proceed to attach the same if he was satisfied that it belonged to any of the Judgement Debtors herein. However, she made it clear that it was her contention that the Auctioneer or the attaching creditor had a primary duty to ascertain the ownership of the goods before making attachment. It had not been made clear to the Objector as to which of the Judgement Debtors was alleged to have an interest in or own her household goods attached. In her view, the Auctioneer had committed an act of trespass when he entered into the Objector’s house and made a proclamation without ascertaining ownership. She emphasised that she was not a party to this suit and any attempt by the Plaintiff’s investigators to drag her name into the affairs of the First Judgement Debtor Company was most unfortunate.

7. The most surprising comment made by the Plaintiff in its submissions filed herein on 25th of October 2013 was that the Objector had not supplied any search or log book for the said motor vehicle to prove that she owned the same. Obviously, the Plaintiff had not read the submissions of the Objector in which she quite clearly stated that she did not own any motor vehicle more particularly the motor vehicle which was attached by the Auctioneers being a double cabin pickup (presumably) Registration No. KBP 468D. The Plaintiff maintained that it had clearly demonstrated that the Second Judgement Debtor lived in the same house as the Objector. Thereafter, the Plaintiff submitted that for an order to lift an attachment of any property to issue, the Objector must prove, on a balance of probabilities, that she is entitled to or has a legal or equitable interest in the whole or part of such property. The Objector had not exhibited any receipts or evidence which clearly showed that she owned the attached household goods. As a result, she had totally failed to prove ownership of such goods as required. The Plaintiff then referred the Court to the case of **Awo Shariff Abdirahim T/A Mohammed Investments v Abdulkadir Shariff Mohammed & Anor (2006) eKLR** in which **Kasango J.** had detailed that:

“the burden of proof that the legal or equitable interest lay with the objector”.

8. Such would be along the lines of the observations of my learned brother Waweru J. in the case of **Akiba Bank Ltd v. Jetha & Sons Ltd (2005) eKLR** when he detailed 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.”

The question before this Court is whether the Objector has done so? Certainly, as far as the motor vehicle Registration No. KBP 486D is concerned, the Objector has stated that she has no interest therein whatsoever and it is not situate in her compound. It seems to me that there is no objection from the Objector in relation to the Auctioneers disposing of the same.

9. But what of the remainder of the household goods? The Plaintiff/Decree Holder relies on the said 2 Reports of Investigations made by Chambers Investigators & Assessors dated 1st July 2011 and 16th September 2011 as regards the Objector's position principally so far as the First Judgement Debtor Company is concerned. Those Reports are now more than 2 years old. However, they confirm the transfer of the residential property to the Objector on 18th of March 1991 and that the Objector was initially a director of the First Judgement Debtor Company upon incorporation on 16th March 1990. She also owned 1 share therein. The 2nd Report goes on to maintain that the Objector resigned as a shareholder of the Company on 3rd June 2006. In fact, I believe that the said Report is in error in relation to the fact of the resignation of the Objector. In line with her evidence, it is obvious that, on that date, she resigned as a director of the First Judgement Debtor Company. However, it is also noted from the said Report dated 16th September 2011, that she transferred her one share to the second Judgement Debtor again on that date. I should also comment that the first Report dated 1st July 2011 is full of heresy as to what the investigator had been told by security guards at the said premises. However, at least in the penultimate paragraph thereof, the investigators established, through the electricity meter installed at the premises, that the owner was the Objector although named as "Mr." not "Mrs." What I feel is significant about the 2 Reports are the Remarks made by the investigator in the penultimate paragraph of the Report dated 16th September 2011. The same reads:

“Our feeling is that if the registered owner of the plot L. R. 209/10722/50, Mr. Maymuna Kassim is one of the guarantors in this matter, then the said plot (plot?) Can be attached and surely, he would exert pressure on Mr. Abdullahi Maalim Ali to service the Debtor (debt?) herein. We would suggest that caveat (caveat?) should be filed against the said plot before writing a demand letter to the Debtors herein.”

10. There is absolutely no evidence produced by the Plaintiff/Decree Holder that the Objector was in any way one of the "guarantors in this matter". To the Court's way of thinking, the Objector's residential premises have been invaded unnecessarily and most probably, illegally. It is quite clear, even from the evidence of the Plaintiff/Decree Holder itself, that the Objector has had nothing to do with the First Judgement Debtor Company since 2006. That was over seven years ago. I consider it to be outrageous that the Auctioneer, at the prompting of the Plaintiff/Decree Holder, could go to the Objector's residential home on the tenuous premise that she had a connection with the First Judgement Debtor Company all those years ago. Indeed, the Objector has owned her home since March 1991 and this Court accepts her evidence to the extent that she maintained that none of the Judgement Debtors herein had any interest whatsoever in the attached goods and that none of them was a tenant, lessee or a lodger in the premises. In these circumstances, I would tend to agree with the Objector that it is unreasonable for her to be expected to produce receipts etc. going back several years, so as to prove that she is the owner of the attached household goods.

11. As a result, I have no hesitation in allowing prayer 2 of the said Notice of Motion dated 20th September 2013. The Objector will also have the costs of her said Application.

DATED and delivered at Nairobi this 20th day of December, 2013.

J. B. HAVELOCK

JUDGE