



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 51 OF 2005

G G-R.....PLAINTIFF

VERSUS

H-P S.....DEFENDANT

AND

H S.....1ST OBJECTOR
NGURUMAN LIMITED.....2ND OBJECTOR
RIFT VALLEY SEED (K) LTD.....3RD OBJECTOR
OCEANWIDE LIMITED.....4TH
OBEJECTOR

RULING

The Plaintiff has a decree for Kshs.97,301,332/15 entered on 2nd October, 2007, which together with interest stood at Kshs.302,784,008/15 as at 2nd October, 2007. On 20th May, 2011, Muhatia Pala Auctioneers proclaimed various properties including four (4) aircraft, twelve (12) motor vehicles and various movables. Also a prohibitory order was issued against properties Title No. Ngong/Ngong/12851, Narok/Nguruma/Komorora/1, LR Nos. 26612 and 26613 and LR No. 22974, Lamu.

The Objectors objected to the said attachment and on 24th June, 2011, all the four (4) Objectors filed Notices of Motion through the firm of Mungu and Company, Advocates to establish their rights in the attached properties in these Objection Proceedings. The Plaintiff/Decree holder filed a Replying Affidavit sworn on 28th June, 2011 in opposition thereof. As is usual in objection proceedings, the Objectors contended that the proclaimed properties belonged to them and that the Defendant/Judgment Debtor has no interest thereon. In the Replying Affidavit, the Plaintiff Decree-holder asserted that though the various properties seemed to be registered in the names of the respective Objectors, either the properties had been transferred to the Objectors (in particular the 1st objector) in circumstances that were meant to defeat the decree herein or that the properties were held by such objectors for the use and control of the Defendant/Judgment debtor.

When those applications came up before me for hearing on 16th November, 2011, the Plaintiff/Decree holder was allowed under Order 19 Rule 2 to make an oral application to cross examine the various deponents of the four Affidavits in Support of the four Notices of Motion. That application was argued on 8th December, 2011 and is the subject of this ruling. The parties filed their respective written submissions which were ably hi-lighted by the respective Counsels on the said 8th December, 2011.

The Plaintiff submitted that the relationship between the Defendant and the Objectors can only be established through cross –examination, that the 1st Objector is the Judgment Debtor’s wife, that what was attached was household goods, that although the property known as LR No. 7583/27 wherefrom the items were proclaimed is registered in the name of the 1st Objector, the transfer to her was made to defeat lawful creditors like the decree holder, that the chattels belong to the Defendant, that it is imperative to interrogate the circumstances under which the properties have been sold or transferred intra-objectors in which the Defendant is not only a major shareholder but also a co-director of the 1st Objector. Mr. Wandabwa, Counsel for the Decree holder relying on the case of James Kariuki Ng’ang’a whose were never, submitted that supplied at the execution stage, cross examination can be ordered for the ends of justice. That through examination, the Plaintiff would be able to show that the objection proceedings have not been undertaken bona fide. The court was urged to grant the application.

The Objectors opposed the oral application, they relied on their written submissions and submitted that the indenture to LR No.7583/27 was made in 1984 before the cause of action for this case arose, that this suit was filed in 2005 whereby the circumstances forming the cause of action cannot be said to have influenced the transfer of that property to the 1st Objector in 1984, that the Plaintiff is in a fishing expedition, that the application was not made bona fides, that the Replying Affidavit to the Notices of Motion had not raised the issues which were contained in the oral application. The Objectors filed and relied on several authorities in support of their propositions that a party applying for cross examination must lay a basis by adducing good reasons for demanding cross examination, that there should be special circumstances to order cross examination, that a formal application under Section 44(1) of the Civil Procedure Act should have been made to lift the corporate veil of the Objectors other than applying orally to cross examine the deponents of the subject Affidavits. The Objectors urged that the application be refused.

I have considered the Affidavits, written submissions and record oral hi-lights thereof and the authorities relied on. My take of the matter is as follows:-

The law has allowed evidence to be proved by way of Affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, mala fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent of an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.

The reason given for the application by the Decree Holder is that the 1st Objector is the wife of the Defendant, that the Defendant is in control and use of the items attached, that there has been intra-objectors transfers of the motor vehicles. Some of these matters were set out in the Replying Affidavit of the Applicant. The Decree-holder alluded to the fact that most if not all the items attached were in the use and control of the Defendant. The issue that there is not only very close relationship between the Defendant and the Objectors has not been denied. It has also been alleged that there has been incestuous

transfers of the attached motor vehicles between the entities associated with the Defendant. The Defendant is said to own **NOTHING** in his own matrimonial home which he transferred to his wife as well as the items attached. It is not denied that he has the use and control over all those items. My take of this is that those are strong special circumstances that militate in favour of having the deponents of the subject Affidavits to be cross-examined on their assertions as to the ownership of the subject items. They have presented those Affidavits for use in Court.

I have also considered the issue of where the justice of the matter lies. The Decree-holder has in his favour a decree of this court issued on 2nd October, 2007. He asserts that he knows that the items attached belong to the Defendant, the objectors, who have strong relationship and/or links with the Defendant assert otherwise. My view is that ordering cross-examination of the deponents of the subject Affidavits in the circumstances of this case would not amount to a trial. The matters I have set out above in my view amount to strong special circumstances in terms of the case of **Lawson –vs- Odham press Ltd (1948) 2 All ER 717.**

I do not think the cross-examination of the deponents would amount to lifting the corporate veil.

My view therefore, is that the oral application to cross-examine the deponents of the Affidavit in Support of the applications dated 24th June, 2011 is meritorious and is allowed. Accordingly, Hedda Steyn, Martin Richard Steyn and Moses Loontasati Ololowuaya are ordered to attend court on a date to be specified to be cross examined on their Affidavits sworn in support of the Motions dated 24th June, 2011.

Dated and delivered at Nairobi this 9th day of **February, 2012.**

A.MABEYA
JUDGE