



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 252 OF 2001

SOUTHERN CREDIT BANKING CORPORATION LIMITED..... PLAINTIFF

VERSUS

KIBIC STAR ELECTRO LTD.....1ST DEFENDANT

MR. KANG SUK LEE 2ND DEFENDANT

MRS. YOUNG SOOK LEE CHO.....3RD DEFENDANT

RULING

1. Before the court is a Notice of Motion application dated 16th February 2012 which seeks, as the remaining substantive prayers, an order that the court be pleased to lift, raise and/or wholly set aside the attachment of the whole of the property attached by M/s Warleen Traders Limited from L.R. No. 18364 in the execution of the decree against the Judgement Debtor.
2. The application is brought pursuant to Sections 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act, Order 22 Rule 51 (1), (2) and 52; Order 51 of Civil Procedure Rules 2010.
3. The application is premised on the grounds stated therein among them that:-
 - § The Objector has a legal and equitable interest in the premises known as L.R. No. 18364 together with the property therein.
 - § The Plaintiff intends to dispose off the attached property by way of public auction and that the Objector's interest in the attached property shall be defeated to his detriment if the intended sale is not stopped by this court.
 - § That it is in the interest of justice that the Objector's claim be established before the attached property is disposed off.
4. The application is supported by affidavit of JENG JIN WEEK, dated 16th February 2012 with its annexures and a further affidavit dated 9th March 2012 also with annexure. These affidavits mainly amplify the above grounds.

5. The application is opposed by a replying affidavit of JECKONIAH AGORO dated 28th February 2012 with its annextures.

6. Briefly the history of the application is that in an effort to execute a decree of this court the Plaintiff on 15th February 2012, through M/s Warleen Traders (K) Limited attached motor vehicle registration numbers KBN 106 X and KAU 752 D at the premises of the Objector, and threatened to sell the same at a public auction in satisfaction of the said decree of this court.

7. The Objector having been notified of the attachment, has moved to this court through these Objection Proceedings stating that the attached property belongs to him and not to the Judgement Debtor. To support this allegation the Objector has annexed to his affidavits 2 documents:-

i. Sub-lease of L.R. No. 18364 to show that he is the Lessee in respect of the property at which the above motor vehicles were attached.

ii. A copy of the proclamation to show the identity of the attached property.

8. The Objector submits that notwithstanding the service of this application the Plaintiff is yet to intimate to the court in terms of Order 22 Rule 52 and 53 whether it intends to proceed with the attachment and sale of the property.

9. On their part the Plaintiff submits that the attached motor vehicles registration number KBN 106 X and KAU 752 D belonged to the Judgement Debtor and that the Judgment Debtor had admitted the same vide annexure JA 1 to the Replying Affidavit of JECKONIAH AGORO. In respect to motor vehicle registration number KBN 106 X it is jointly owned between the Judgement Debtor and Equity Bank, and that it should be Equity Bank and not the Objector who should bring these Objections Proceedings. However the Objector states that the letter JA – 1 is not genuine as the Objector does not write in the English Language and he could not admit liability in such writing.

10. I now raise the following issues in order to resolve the matter:-

(a) Whether Order 22 Rule 52 and 53 was complied with, and the consequences of non-compliance.

(b) Whether the Objector need to be heard on his objection and whether there is a need to determine the ownership of the disputed property in question.

11. In regard to the first issue Order 22 Rule 52 requires the court, upon hearing the ex-parte objection proceedings, to act as follows.

Order 22 Rule 52:-

“ . . shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

Rule 53 states that failure by the attaching Creditor to comply with Rule 52,

“ . . the court shall make an order raising the attachment as to the whole or a portion of the property subject to the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

Clearly, the requirement under Order 22 Rules 52 is mandatory and must be complied with. The only issue in this matter is whether the Objector or the court issued the notice under Rule 52. The Rule refers to notice in writing. The court order dated 17th February 2012 does not, in my view, constitute such notice in writing. The order merely states the nature of the application and the orders that were granted. In

my view, the notice required under Rule 52 must be specific, either as part of the Order, or as a penal notice under the Order, or a completely separate written notice. The service of the application and the Orders of 17th February 2012 upon the Judgement Creditor did not amount to a notice required under Order Rule 52 of Order 22. Therefore the Judgement Creditor had no obligation to comply thereto.

12. As regards the second issue, it is procedural justice that a party who lays a claim to a property under threat of sale should be allowed a chance to prove ownership before the property can be sold. The Objector has laid a reasonable claim to the premises and to one of the vehicles. However, the premises have not been attached and therefore this claim is superfluous. The Objector's claim to the aforesaid motor vehicles are at best tenuous. This is so because as for KBN 106 X the Registration Certificate annexed as **JJW – 2** clearly shows that the Judgement Debtor owns the same jointly with Equity Bank Limited. Equity Bank Limited is not the objector in these proceedings. Again, it is four (4) months since the attachment was levied. If Equity Bank was interested to join these proceedings as an Objector, it would have done so. Further, the Judgement Debtor has written a letter annexed as **JA – 1** admitting the ownership of both motor vehicles. In my view the legitimacy of this letter or admission is questionable as clearly, it was not written by the Judgement Debtor though it might have been signed by him. My finding that Motor vehicle registration number KBN 106 X belongs to the Judgement Debtor is not based on this admission or letter but on the strength of the Registration Certificate annexed as **JJW – 2**. In my Ruling the Judgement Debtor is the owner of motor vehicle registration number KBN 106X. This means that the Judgement Creditor is at liberty to attach and sell the said motor vehicle in satisfaction of the judgement debt.

13. As for motor vehicle KAU 752 D, there is no evidence that it belongs to the Judgement Debtor, as I have already disregarded the said letter purportedly admitting ownership. The Objector's claim to that vehicle is also not convincing. The Objector's claimed is hinged only on the fact that it was attached while under the premises which belong to the Objector. In my view, attachment of a movable asset can be levied at any place the asset is located. The Objector has not annexed a Certificate of Registration or log book. It would have been much easier to do that and to prove ownership. However since both the Judgement Debtor and the Objector have laid claim to this motor vehicle, this court cannot allow it to be sold until the true ownership is established.

In the case of **BRAR – VS – WARENG QUARRY ACHARE CONSTRUCTION, CIVIL APPEAL NO. 10 OF 1977**, it was held that:-

“the purpose of instituting proceedings under (now our Order 22) Rules 51 – 53 is to provide the Objector with an opportunity to establish his claim in the attached movable property”.

The same case is also an authority that the evidence of registration or log book issued under the Traffic Act to a person is *prima facie* indication of ownership unless the contrary is proved.

I find that attachment of the motor vehicle registration KAU 752 D was not proper under the circumstances, and I order and direct that it forthwith be released to the Objector, or it be returned to the Objectors' premises from where it was attached.

As both the Objector and the Judgement Debtor have succeeded and failed in this application in equal measure I direct parties to bear own costs.

These are the orders of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 26TH DAY OF JUNE 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Change for the Plaintiff

Marete H/B Odera for the Objector

Teresia – Court clerk