



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 68 OF 2003**

**DUBAI BANK KENYA LTD.....PLAINTIFF**

**VERSUS**

**COME-CONS AFRICA LTD.....DEFENDANT**

**AND**

**IMPAK HOLDINGS CO. LTD.....OBJECTOR**

**R U L I N G**

Having obtained a decree against the defendant herein, the plaintiff has now moved the Court by way of a Notice of Motion dated 12<sup>th</sup> January 2012 expressed to be brought under the provisions of **sections 28 and 32 of the Registration of Titles Act (Cap 281 Laws of Kenya) and sections 1A, 1B, 3 and 3A and 63(a)(b) (c) and (e) of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 22 Rules 9 and 35 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law,** seeking the following orders:

- 1. That the Application be certified as urgent and the same be heard ex-parte in the first instance.**
- 2. That the honourable court be pleased to grant an order of prohibition to prohibit the Defendant/Judgement Debtor either by itself, its servants, agents and/or employees or any other person claiming rights through the Defendant from alienating, transferring, assigning, allocating disposing or in any other manner whatsoever developing, using or interfering wasting, damaging, going ahead with or completing effecting any sale or transfer commenced prior hereto of the property known as LR No. 209/8381/2 (IR. 48604) situate in Nairobi pending hearing and determination of this application.**
- 3. That the honourable court be pleased to order the attachment of the Defendant/judgement Debtor's property known as LR No. 209/8381/2 (IR. 48604) situated in Nairobi in furtherance of execution of this honourable court's decree issued on 25/8/2011.**
- 4. That the Honourable court be pleased to issue an order compelling the personal attendance of the Defendant's/Judgement Debtor's Directors to appear in court for oral examination to ascertain if**

**the Judgement Debtor has any property or means of satisfying the decree issued on 25/8/2011.**

**5. That cost of this suit be borne by the Defendant/Judgement Debtor in any event.**

The said application based on the following grounds:

**a) The honourable issued on 25/8/2011 a decree in favour of the Decree-holder for a sum of Kshs. 29,498,862.50 with interest at court rates from the date of filing the suit to the date of payment.**

**b) The warrants of attachment issued to Wright Auctioneers by the honourable court on 22/9/2011 puts the decretal amount outstanding as at the issuance date to be Kshs. 60,428,523.50.**

**c) The Decree holder has been unable to locate any movable assets of the Judgment Debtor and hence unable to execute the said decree as the Judgement debtor has been on a selling expedition to dispose all its assets and has closed its offices in a bid to avoid satisfying the court decree in this matter to defeat the course of justice.**

**d) The Judgement Debtor is at the moment in the process of sale of its asset known as LR. No. 209/8381/2 IR. 48604 the only known asset of Defendant as known to the plaintiff.**

**e) That unless the orders of prohibition and attachment and orders compelling the Judgement Debtor's Directors to be orally examined in court if the Judgement Debtor has any property or means of satisfying the decree are issued as prayed, the Plaintiff/Decree Holder may not be able to execute the court's decree issued on 25/8/2011.**

**f) That unless the orders sought are granted the application will be rendered nugatory.**

The application was supported by an affidavit sworn by **Hassan Zubedi**, the plaintiff's Executive Chairman. In the said affidavit, it is deposed that following the entry of judgement and issuance of the decree herein warrants of attachment of the movable assets of the defendant were issued to auctioneers to execute but were returned unexecuted due to the failure by them to trace any of the defendant's movable property. It is deposed that the defendant has an immovable property known as LR No. 209/8381/2 (IR. 48604) which the defendant is in the process of transferring with the intention of defeating the cause of justice. In order, therefore, to prevent the same from being alienated, disposed of, wasted or encumbered, it is necessary that the same be attached and the defendant's directors be compelled to personally appear in court for oral examination to ascertain if the Judgement Debtor has any other property or means of satisfying the decree herein.

In opposing the application, the defendant swore a replying affidavit on 8<sup>th</sup> February 2012 through one of its directors, **Sukudev S.** In the said affidavit, the deponent states, based on advice received from his advocates, that the application is misconceived, devoid of merit, frivolous, bad in law and abuse of the process since no grounds have been disclosed to warrant the grant of the orders sought. It is further deposed that the application does not comply with the law and Order 22 rule 18(1)(a) of the Civil Procedure Rules, in particular, is defective in form and that the jurisdiction of the Court has not been properly invoked. According to the deponent, the respondent disposed of the said property in 2006 to Kent Construction Company Limited and ceded both possession and ownership and no longer has any interest therein. The deponent further states that no issues have been disclosed to warrant the intended examination of the respondent's directors. Accordingly, it is the respondent's view that the application ought to be dismissed.

In support of the application, **Mr. Ali**, learned counsel for the applicant, while reiterating the contents of the supporting affidavit, submitted that as the application was unopposed the same should be granted. Since by its ruling dated 10<sup>th</sup> May 2012 this Court dismissed the objector's application, **Mr. Ali** submitted that the objector was a non-entity in these proceedings.

Although strictly speaking the objector, its application having been dismissed by the said ruling, was

nolonger a necessary party to these proceedings, in the interests of justice I permitted **Mr. Kinyajui**, learned counsel for the objector to address the Court. **Mr. Kinyanjui**, rightly submitted that the respondent having sworn and filed a replying affidavit, the application cannot be deemed to be unopposed. I agree that the mere fact that a party fails to attend court on the day the matter is listed does not necessarily mean that he does not oppose an application where he has shown an intention to do so by way of either a replying affidavit or grounds of opposition or both. The Court is duty bound to look at the record in order to arrive at a just decision. A just decision cannot be said to have arrived at if the Court decides to ignore part of the record before it. Under the provisions of Order 51 rule 12 of the Civil Procedure Rules all applications or other process shall be deemed to have been made when filed in court. It follows therefore that the mere failure to orally argue the application or oppose the same does not render the application merited or unmerited. At the end of the day the Court has to consider the matter and see to it that the cause of justice is served.

In **Mr. Kinyanjui's** view, although the objection was dismissed, that did not take away the evidence presented since in the said decision it was the failure to meet the threshold that led to the dismissal of the objection proceedings. That dismissal did not take away the fact that third parties have a stake in the said property which stake requires investigation by way of oral evidence. It was further submitted that it would amount to a miscarriage of justice if the sale proceeded without the property being valued. It was further submitted that the application was incompetent for failure to serve the decree on the said interested parties. It was further submitted that the mere fact that the defendant is indifferent should not be visited on those who have stakes in the said property. According to counsel, it is necessary that the registrar of companies be summoned to come to court and clear the air with regard to issues revolving around this matter. Accordingly the application does not merit being granted.

In a rejoinder, **Mr. Ali** submitted that since the objector had not filed any papers in opposition to the application, the submissions made on its behalf have no probative value and should be disregarded. Its objection having been dismissed, **Mr. Ali** contends that the issues raised herein are *res judicata*.

I have considered the foregoing. Whereas the defendant swore a replying affidavit, the gist of the same is that it no longer has interest in the subject property having offloaded its interest therein by way of sale to Kent Construction Company Limited in 2006. Accordingly, the factual issues raised in the said affidavit were not seriously contested and hence remain wholly uncontroverted. It follows therefore that the allegation made that the defendant's movable properties are unknown to the plaintiff must be taken to be true for the purposes of this application.

An issue has, however, been raised as to whether the application meets the requirements of Order 22 rule 18 (1) (a) of the Civil Procedure Rules. Under that rule where an application for execution is made after one year after the date of the decree the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.

In this case the decree was given on 30<sup>th</sup> June 2010 and issued on 25<sup>th</sup> August 2011. However, the order on costs was, just like the judgement, entered by consent on 30<sup>th</sup> July 2011. That consent, however, in my respectful view, was not an order made against the judgement debtor on a previous application for execution.

It follows therefore that the applicant should have issued a notice to show cause before putting in motion the execution process. Order 22 rule 18(2) however states that:

**“Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers**

**that the issue of such notice would cause unreasonable delay or would defeat the ends of justice”.**

In the present case judgement was entered by consent. As already stated the allegation that the defendant has no movable assets known to the plaintiff has not been controverted. An allegation has been made that there are attempts to alienate the subject property. According to the defendant the property was sold to Kent Construction Company Ltd which company has not claimed any interest in the said property. The only person who has claimed interest in the property is the objector whose claim has, however, been disallowed.

Taking into account the circumstances of this case, I am satisfied that this is one of the cases in which the invocation of the provisions of Order 22 rule 18 (2) is deserved. Accordingly, I preclude the plaintiff from the necessity of issuing the notice to show cause in this case.

In light of my ruling aforesaid, I agree that the issues raised on behalf of the objector herein touching on the third party's stake in the suit property cannot be determined in an application of this nature. There is an express procedure provided by the law for those who claim an interest in an attached property and the law as I understand it is that where there is an express procedure provided by the law, that procedure should as much as possible be adhered to. The said issues can only be determined where a specific application is made by a party. With respect to valuation of the property, it has not been contended that the sale of the subject property is proceeding without compliance with the legal requirements since the process of sale has not been put in motion as yet. If the decree holder were to proceed with the sale of the property in question without complying with the laid down procedures and regulation such sale, there is nothing to prevent a party aggrieved thereby from invoking the Court's jurisdiction to rectify the same.

Whereas the Court recognised that there were some issues that needed to be clarified by the registrar, as already held, the burden of proof of interest in an attached property in objection proceedings falls on the objector. It was therefore incumbent on the objector to avail all relevant satisfactory material in support of his case. Where the material presented is insufficient the Court has no other recourse but to dismiss the objection. Whereas the dismissal of the objection does not *ipso facto* confer the ownership of the property attached on the judgement debtor, it gives the decree holder the go ahead to proceed with the execution notwithstanding that particular objector's claim. In the premises I hold that it is not within the Court's powers to, *suo moto*, summon the Registrar of Companies in these proceedings.

The upshot of the foregoing is that the Notice of Motion dated 12<sup>th</sup> January 2012 succeeds in terms of prayer 3 thereof. Prayer 4 is, however premised on whether or not the disposal of the said property is capable of satisfying the decree herein. That prayer would be unnecessary if the decretal sum is settled. In the circumstances it is premature at this stage to grant the same. The decree holder will also have the costs of this application.

**Ruling read, signed and delivered in court this 21<sup>st</sup> day of June 2012.**

**G.V. ODUNGA**  
**JUDGE**

**In the presence of:**

Mr Okindo for Mr Ali for the Plaintiff

No appearance for the defendant and the objector