



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 786 OF 2007

MOHAMMED INAYAT

JAMADAR.....PLAINTIFF

VERSUS

DILSHAD AMANULLA SUBEDAR.....DEFENDANT

AND

CATHERINE T. ALAL.....1ST OBJECTOR

SUHEL AMANULLA SUBEDAR.....2ND OBJECTOR

WASIM AMANULLA SUBEDAR.....3RD OBJECTOR

RULING

There are two applications before this court filed on 8th March 2012. The first is by the Defendant brought by way of chamber summons dated 7th March 2012, and the second by the Objectors by way of a notice of motion dated 8th March 2012. Both the Defendant and Objectors seek orders from this Court for stay of proceedings or of any further execution of the decree and warrants of attachment herein against the Objectors, or against any of the Objectors’ respective goods or property.

The Defendant also seeks an injunction seeking to restrain the Plaintiff/Decree holder and his agents and/or auctioneers from conducting a public auction or sale of the Defendant’s movable or immovable property, and a mandatory injunction reversing any distress, proclamation or removal of the Defendant’s property. The Objectors in addition also seek orders that the proclamation dated 30th March 2011 by Mugema Enterprises Auctioneers be lifted, and/or that the same be set aside.

The grounds for the both applications in summary are that the objectors have legal ownership and possessory rights over the goods proclaimed by the Decree holder, and that the Judgment Debtor has no legal rights of possession or ownership over the goods proclaimed and attached to the Decree issued by the Court. These grounds are detailed out in the supporting affidavit sworn by the 3rd Objector on 8th March 2012 and one sworn on 7th March 2012 by Odhiambo M.T. Adala, the Defendant’s Advocate.

I will address the Defendant’s application first. Upon perusal of the Court record, it is the finding of this Court that the said application is *res judicata* as the same orders were sought by the Defendant in an application dated 28th July 2011, which was heard and dismissed by this Court (Ougo J.) on 26th January 2012. The Defendant’s application dated 7th March 2012 is therefore dismissed, and the Defendant shall bear the costs of the application.

The Objectors' application mainly concerns the proclamation issued by Gallant Worldwide Investments dated 29th February 2012, in which two motor vehicles registration numbers KAK 999 T and KAX 930 E, as well as various household items were due to be attached within seven days of the proclamation. The Objectors aver that the 1st Objectors is the purchaser and owner of motor vehicle registration No. 999 T, and that the said motor vehicle has never been the property of the Defendant/Judgment – Debtor herein, neither is it subject to attachment to a decree or judgment obtained against the Defendant.

Further, that motor vehicle registration No. KAX 930 E was involved in an accident on the 16th August, 2011 and the same was reported to the police who issued a Police Accident Abstract. The Objectors also state that the household property in the suit premises do not belong to the Defendant/Judgment debtor but to the 2nd Objectors and their respective families, and also to one Samir Sayed Amanualla Subedar who is their brother. Copies of the said proclamation, the sale agreement entered into by the 1st Objector and police abstract are attached as evidence.

The Plaintiff opposed the application in a Replying affidavit he swore on 15th March 2012, wherein he stated that the motor vehicle registration number KAK 999 T was first attached on 25/7/2011 in execution of the decree issued herein and left in the custody of the Defendant, and that as at 27/2/2012 when the auctioneer proclaimed the goods listed in the current proclamation, the said vehicle was physically at the Judgment Debtor's premises and no one informed him of any change of ownership as alleged . Further that the Objectors' application is an abuse of the due court process and the same should be dismissed with costs.

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The Objectors application is brought under Order 22 Rules 51 and 52 of the Civil Procedure Rules which provide as follows:

51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

(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.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and 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 pr

The burden of proof is on the objectors to establish their legal or equitable interest in the property subject matter of the execution objected to, and it is not for the decree holder to prove that the goods belong to the Defendant. The objectors have not brought any evidence of any title to the motor vehicles or of the household property they allege to own, and which are the subject of the proclamation. The Objectors have annexed a sale agreement with respect to motor vehicle registration number KAK 999T between the 1st Objector and one Wasim Aman. However no evidence of the ownership of the motor vehicle by the said Wasim Aman is provided so as to demonstrate the 1st Objector's equitable rights.

The Plaintiff/ Decree Holder has also given evidence that the said property was in the possession of the Defendant at the time of the attachment, which is not disputed by the Objectors. In addition, the Objectors are not parties to the suit herein and cannot therefore plead that they intend to settle the decretal amount, which pleading and prayer was in any case dismissed by this court in the ruling delivered on 26th January

2012.

For these reasons the application by the Objectors dated 8th March 2012 is dismissed, and the Objectors shall bear the costs of the said application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE