



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 200 OF 2008

FLEX AIR CARGO
LIMITED.....PLAINTIFF

VERSUS

DELTA CONNECTION
LIMITEDDEFENDANT

AND

AVIATION MANAGEMENT SOLUTIONS
LTD.....OBJECTOR/APPLICANT

R U L I N G

By an amended Chamber Summons dated 16th March, 2010, the Objector herein applied from the Court for orders that –

1. (Spent).
2. *Pending the inter partes hearing of this application, there be temporarily injunction order restraining the Plaintiff/Decree-Holder whether by itself, its employees and/or its agents or otherwise whosoever from proceeding with the attachment and sale of the Objector's moveable property in the custody of the Defendant/Judgment Debtor proclaimed by Messrs Keysian Auctioneers on the 2nd day of February, 2010.*
3. *The attachment and sale of all the Objector's moveable property in the custody of the Defendant/Judgment-Debtor, as per Notice of Objection filed herein on 10th February, 2010, be raised.*
4. *The Court be pleased to make any other such orders and/or give directions as it deems just in the circumstances.*
5. *The costs of and incidentals of the application be provided for.*

The application is supported by the annexed affidavit of Sukhbir Sira, the General Manager of the Objector/Applicant and is based on the grounds that –

1. *The Plaintiff/Decree-Holder on 26th January, 2010, vide proclamation Notice dated 26th January, 2010 issued by/through Messrs Keysian Auctioneers, proclaimed the goods owned by the Objector but in the custody of the Defendant/Judgment Debtor.*
2. *The Applicant objected to the intended attachment of the said goods vide a Notice of Objection dated 2nd February, 2010 and filed with the Honourable Court on the same date.*
3. *By a Notice of Intention To Proceed dated 10th February, 2010 and served on the Objector's Advocates on 15th February, 2010, the Plaintiff/Decree-Holder has intimated that it intends to proceed with execution of the Decree.*
4. *The said proclaimed goods are the property of the Objector which have been leased to the Defendant/Judgment-Debtor.*
5. *The Objector, who is not a party to this suit, is a distinct and separate legal entity from the Defendant and therefore its property cannot be proclaimed, attached and sold in satisfaction of the Defendant/Judgment-Debtor's debt.*
6. *Unless restrained by this Honourable Court, the Plaintiff/Decree-Holder intends to proceed with execution of the Decree and might sell the Objector's goods proclaimed on 26th January, 2010.*

The application is opposed by the replying affidavit of Bootsyt Mutiso,

a Director of the Plaintiff Company, in which he avers that he was informed by Mr. Muganda Wasuna of Keysian Auctioneers that prior to the proclamation of the goods, Mr Wasuna satisfied himself that the same belonged to the judgment-debtor. He further states that it is not clear under what circumstances or arrangement the judgment-debtor and the Objector shared offices, if at all, and that allegation stands unsubstantiated. Regarding the transfer of ownership of motor vehicle Reg. No. KAV 138N, he attested that the transfer had never been effected. He further stated in his affidavit that **“the inventory of Company equipment and furniture”** was also a document prepared by the Objector and whose veracity could not be verified, and therefore it was not conclusive or even *prima facie* evidence of ownership. Finally, he deposes that if the Objector truly owned aircraft Boeing 737 – 200 QC Reg. 5Y JAP (EX 5Y – KQN), then it ought to provide cogent proof of ownership.

With the leave of the Court, both parties filed written submissions which were highlighted by their respective Counsel. After considering the pleadings, the affidavits and submissions by the parties, this Court notes that the main issues strenuously contested by the parties relate to the attachment of the office equipment, an aircraft and a motor vehicle. Before addressing each of the above items, I am constrained to observe that in paragraph 4 of the replying affidavit sworn by Bootsyt Mutiso, the deponent says that Mr. Wasuna of Keysian Auctioneers informed him that prior to proclaiming the said goods, he had satisfied himself that the same belonged to the judgment-debtor. He does not explain how he satisfied himself. It is not enough for a deponent to depose that he was informed by a third party that the latter satisfied himself that prior to proclaiming any goods, such third party satisfied itself that the said goods were the property of the judgment-debtor. It is imperative that the deponent should move a step further and state that he believes such information to be true and further explain how such satisfaction was arrived at. The process by which an auctioneer satisfies himself that the goods to be attached belong to a judgment-debtor must also be shown to be flawless. Unless such further steps are clearly demonstrated to have been taken, a decree-holder's contention that the goods truly belong to the judgment-debtor would not be acceptable on its face value as foolproof.

In paragraph 3 of the supporting affidavit sworn by Stephen Hannington Onyango, it is stated that auctioneer went to the reception of the Objector's office and left a proclamation, and that he did not verify that the goods did not belong to the Objector. The first of these goods is the aircraft. A close scrutiny of a copy of the proclamation left in the Objector's office reveals that the proclamation relates essentially to office equipment and there is no mention whatsoever of an aircraft. In the circumstances, no aircraft was

attached. Even if an aircraft had been attached, there is a conflict as to whether that aircraft was a Boeing 737 200 Reg. ST JAP (EX ST KQN) or whether it was Boeing 737 229 C Reg. 5Y-JAP. In view of the fact that no aircraft is mentioned in the proclamation, the dispute as to the actual aircraft attached, and whether it belonged to the judgment-debtor or to the Objector remains academic.

Regarding the motor vehicle, the deponent avers that although the Objector/Applicant did not immediately register the transfer of the proclaimed motor vehicle, the same had been purchased by the Applicant/Objector in 2006. This assertion is supported by a copy of the sale agreement which is attached to the supporting affidavit of Sukhbir Sira, the Objector's General Manager, and which shows that motor vehicle Reg. No. KAU 138N was sold by the judgment-debtor to the Objector. The date of sale is given therein as 1st September, 2006. The form of transfer of ownership shows that the said vehicle was transferred by the judgment-debtor to the Objector on 4th September, 2006. It has been argued that the transfer was not registered. Under **Order XXI Rule 53 (1) of the Civil Procedure Rules**, "**Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree**" is entitled to object to the attachment of such property. Even if the Objector may not have been the registered owner of the vehicle, he has amply demonstrated that he has an equitable interest in the vehicle as a purchaser and therefore he is entitled to object to the attachment.

Finally, there is a letter dated December 12, 2007 from J.W. Muigai & Associates, Certified Public Accountants which was produced by Mr. Onyango as exhibit "SHO 2". It is addressed to the Manager, Aviation Management Services Ltd. who are the Objectors /Applicants herein, and which depicts an inventory of the Company's equipment and furniture. This inventory incorporates 16 desks with drawers; 2 side desks; 5 executive chairs; 6 workstation chairs; 6 arm reception chairs; 9 visitors chairs; 26 wooden file cabinets; 1 large file cabinet; 14 workstation phones; 8 computers etc; an internet modem; a VAP modem; Panasonic PABX; fax machine; Panasonic photocopier/printer; HP Printer, water dispenser; freezer; and a micro wave. Against this list, the schedule of moveable property attached by the auctioneer includes "office desks; office chairs; photocopying machine; water dispenser; side drawers; computers and printers; PABX machine and fax machine, M/V Reg. No. KAU 138N; telephone heads; plus all other attachable items in the judgment-debtor's office. Most probably these items are some of those on the list of the Objectors inventory attached to the letter from J.W. MUIGAI & ASSOCIATES referred to herein above.

The Objector has offered an explanation as to how they happened to share office accommodation with the judgment-debtor. The explanation is that under the provisions of the Civil Aviation Act (Cap 394), the Applicant is not allowed to operate the Aircraft as it does not have the relevant approval, hence the reason for leasing the Aircraft to the Judgment-debtor, which has been having such a certificate since the time the Aircraft was leased to it. Since the Aircraft had been leased to the judgment-debtor, the sharing of the office space between the two Companies enables the Objector/Applicant to safeguard its interest in terms of the lease agreement by auditing and monitoring the state of the Aircraft. In my view, the explanation given is plausible. For that reason, and given the letter from J.W. Muigai & Associates, Certified Public Accountants, giving an inventory of the Objector's equipment and furniture as at 2006, there is every probability that the goods attached do not belong to the judgment-debtor but to the Objector as the two Companies are distinct and separate legal entities. It is therefore difficult to say that the attached moveable property belongs exclusively to the judgment-debtor. On the contrary, the Objector has demonstrated adequately its legal interest in the same.

For the above reasons, I find that the Applicant has established, on a balance of probability, that the attached items belong to it and not to the judgment-debtor. Prayers (2) and (3) of the amended application by Chamber Summons dated 16th March, 2010 are accordingly granted as prayed. In the circumstances of this case, I don't find it fair to saddle the decree-holder with the costs of the application and I therefore direct that each party shall bear its own costs of this application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 25th day of January, 2011.

L NJAGI

JUDGE