



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL SUIT NO.24 OF 2002

IMPERIAL BANK LTD.PLAINTIFF/RESPONDENT

-VERSUS-

1. LEISURE CAR HIRE TOURS & SAFARIS LTD.

2. AMJAD PARVEZ MALIK

.....DEFENDANTS

3. MAHMOUD PARVEZ MALIK

SATTARA JABENE MALIK.....OBJECTOR/APPLICANT

RULING

The objector moved the Court by Chamber Summons dated **27th July, 2010** and brought under Order XXI (Rule 57) of the earlier edition of the Civil Procedure Rules, and ss. 3A and 91 of the Civil Procedure Act (Cap.21, Laws of Kenya). The objector's main prayers were as follows:

- (i) "that the attachment carried [out] by Thaara Auctioneers on 18th June, 2010 be lifted and/or vacated with costs to the objector"; and**
- (ii) "that the objector be compensated by way of damages."**

The application rested on the grounds that: (a) the objector is a stranger to the suit and/or to the proceedings herein; (b) the objector is the legal owner of all the attached household goods.

Evidence to support the application is set out in the affidavit of **Sattara Jabene Malik**, the objector, sworn on **27th July, 2010**. The tenor and effect of the depositions may be thus set out:

- (i) the deponent is the occupant of Flat No.1A on 1st Floor of Plot No. 622/II/MN and her tenancy thereof began on 1st September, 2008;**
- (ii) all the furniture, electronics and household goods in the said flat are the property of the deponent, even though these have been proclaimed by the auctioneers;**
- (iii) the deponent believes to be true the advice of her Advocates, that the decree affecting the said premises "was strictly against the defendants";**
- (iv) the objector is in no way connected to the suit and is a total stranger to the same;**
- (v) the attachment amounts to trespass to property and, on that account, the deponent will seek**

damages.

The plaintiff's Legal Officer, **Paula Ngetich**, on **29th July, 2010** swore a replying affidavit, which may be summarized as follows:

(i) the plaintiff's Notice of Intention to Proceed dated 29th June, 2010 was served upon the objector's Advocates, Manwa Mabeya & Co. Advocates, on 30th June, 2010;

(ii) under the provisions of the Civil Procedure Act, the objector's application should have been filed within 10 days of receipt of the Notice of Intention to Proceed;

(iii) the objector's application came as much as 28 days from the date of service of the Notice of Intention to Proceed upon the objector's Advocates;

(iv) "the objector herein having failed to file proceedings to establish her claim within the time specified, she is deemed to have waived her objection and the attachment and consequential execution herein should proceed wholly.";

(v) "the objector's application having been filed out of time is improperly before the Court and is incompetent and otherwise an abuse of the process of this Court";

(vi) "the objector has in any event not tendered any evidence to demonstrate that the attached goods belong to her."

Learned counsel for the objector submitted that she had produced cogent evidence to show that she is the occupant of the **"suit premises"**, being a tenant bearing rights under a tenancy agreement. He urged that **"the objector is not party at all and did not participate in [the] proceedings which gave rise to the warrants of attachment of her property, nor was she at any time cited in any other way in these proceedings"**; and consequently, **"the act of the judgment-creditor instructing an auctioneer to move into her premises with [the] aim of attaching her household goods amounts to an act of trespass..."**

On the contention that the objector's application is coming belatedly, counsel had the riposte that **"as at the time the objector filed her application the judgment creditor's agent had not collected the goods from the premises, which is a clear indication that they knew...the property they were attaching did not belong [to] nor [was] associated with any of the defendants..."**

Counsel urged the Court to **"invoke its inherent powers and find..that the objector has a valid claim which cannot be defeated merely on technicality."** Counsel submitted that the judgment-creditor had not disputed the objector's claim to ownership – and that this **"goes ...to prove the objector's claim."**

To the foregoing submissions, the plaintiff/respondent, through counsel, relied on the content of the replying affidavit, apart from raising certain grounds, in contest.

Counsel contended that the objector's application was improperly before the Court: for the plaintiff had served upon the objector's counsel a Notice of Intention to Proceed, as required under Order XXI, Rule 54 of the Civil Procedure Rules; but the objector had not, as required under Order XXI, Rule 56 filed her application within 10 days of receiving service. Besides, counsel submitted, the objector failed to file proceedings to establish her claim within the time specified under Order XXI, Rule 58; and therefore, **"she must be deemed to have waived her objection."**

Counsel submitted that the objector's application had been filed out of time, and so it was improperly before the Court, was incompetent, and was otherwise an abuse of Court process.

Counsel submitted that the objector had tendered no evidence to demonstrate that the attached goods belonged to her; the auctioneers who attached the goods found the same in premises occupied by 2nd defendant/judgment-debtor, **Amjad Parvez Malik** who is husband to the objector. It was submitted that

the relationship between all the judgment-debtors and the objector is a material fact which the objector ought to have disclosed in her supporting affidavit, if she was acting in good faith, in making the instant application; and it was urged that ***“this material non-disclosure ought to render her application herein incompetent and an abuse of the process of the Court.”***

Counsel contested the applicant’s reliance on a tenancy agreement between herself and a landlord, as the “best” evidence that the goods in question, kept in the ***“suit premises,”*** belonged to her. Insofar as such an agreement did not directly link the objector to ownership of the goods, counsel urged that ***“it is safe to conclude that the attached goods do belong to the judgment-debtors as the objector has utterly failed to establish ownership thereof”***; and that ***“the objection raised herein by the objector is merely to frustrate the execution of the decree herein, and hence deny the plaintiff the just fruits of the judgment entered in its favour on 28th May, 2009”***.

It is a fact that the decree based on the Court’s judgment of ***28th May, 2009***, which turns against the defendants, is due for execution, and that the plaintiff has an entitlement to the fruits of that judgment. The question before the Court, therefore, is only the procedural one, as to the mode of accessing and attaching the property of the defendants. The plaintiff, through auctioneers, traced such property to a house occupied by 2nd defendant who, the record shows, is the husband of the objector herein.

This Court takes ***judicial notice*** that goods held in a house occupied by 2nd defendant presumptively belong to 2nd defendant, or, where 2nd defendant has a spouse, to the said spouse, or to the two jointly. The exact position will be, as I also take judicial notice, best known to 2nd defendant and his spouse (the objector). This presumption bears significance, in terms of ***burden of proof*** in law. The plaintiff only has to show the existence of the presumptive position; then the evidential burden falls upon 2nd defendant and the objector to provide the detailed evidence to confirm the true position. In this instance, the objector’s evidence is guarded and laconic, and certainly says little about her relationship to the defendant-judgment-debtors.

It is to be concluded, on balance, that the plaintiff properly traced the goods for attachment; and the objector has not succeeded in showing a valid, alternative position. It is notable that even the submissions made for the objector have been laconic, and did not help to show any impropriety in the plaintiff’s mode of execution of the decree by attachment of the goods found in the ***“suit premises.”***

Counsel for the objector singularly failed to address the points of law raised for the plaintiff, in relation to the requirements of Order XXI, Rules 54, 56 and 58: which shows acknowledgement that the objector failed to comply with the limitations of time prescribed.

There is no basis for allowing the objector’s Chamber Summons of ***27th July, 2010***; ***this application is dismissed with costs to the plaintiff/judgment-creditor. The plaintiff may proceed with attachment and sale of the subject goods, failing any consent on mode of execution.***

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 28th day of October, 2011.

H.M. OKWENGU
JUDGE