



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVILSUIT NO. 85 OF 2011

NGENYE KARIUKICLAIMANT

VERSUS

KHEIRA OMAR MAALIMRESPONDENT

AND

MASTER COMMODITIES LIMITED 1ST OBJECTOR
FARAH MOHAMMED..... 2ND OBJECTOR

Coram : Mwera J.
Thuku for Claimant
Gaturu for 1st Respondent
Gachie for 2nd Respondent
Njoroge court clerk

RULING

On 27.7.11 the 2 objectors herein invoked the powers donated by Order 22 rules 51, 52 of Civil Procedure Rules and section 3A of Civil Procedure Act for the main orders:

- i) that the court do stay the execution herein being effected by M/s Valley Auctioneers; and
- ii) the proclamation done on 21.7.11 be lifted.

It was contended that by the proclamation above, M/s Valley Auctioneers proceeded or was in the process of attaching the applicant/objectors' electronic items and furniture purportedly in satisfaction of a decree against the respondent/judgement debtor herein, Kheria Omar Maalim. The proclamation was against the 1st objectors tools of trade in a plot known as LR No. 209/1405, Kimathi Street, Nairobi. That the objectors have never had dealings with the decree-holder, only that the judgement debtor was a director of the 1st objector -limited liability company. Thus its assets cannot be said to belong to the judgement debtor/respondent in her personal capacity.

One Hassan Mohamed, a director with the 1st objector swore a supporting affidavit to the effect that the 1st objector occupied a shop in the said plot where it ran a restaurant and cyber café. It had equipment for those businesses there - computers and furniture, bought in 1996. Having had no dealings with the decree – holder, the 1st objector could not countenance attachment of its assets to satisfy the decree herein. May it be observed that as at this point it is not shown by certificate of incorporation that the 1st objector is a limited liability company. As to the status of the 2nd objector in these proceedings – Farah Mohammed,

his affidavit simply claimed that his household goods were attached from his home at Karen for no reason.

In a replying affidavit filed by the auctioneer, Samuel Mutahi Gathogo, he claimed that it was the judgement – debtor Mrs Kheira Omar Maalim, whom he knew, who told him that the property in the premises herein belonged to her, at the time warrants of attachment and sale were served on her. She had recently sold her shareholding in the restaurant to M/s Master Commodities Ltd – the 1st objector, who would soon stock the place with its own furniture and fittings. And with that the auctioneer proceeded to attach the property in the café as well as from her house at Karen. Samuel Gathogo's inquiries at the offices of M/s Chaudhri & Associates advocates who had acted for the 1st objector did reveal that one Hassan Mohammed and the judgment – debtor (Kheira) were no longer shareholders in the 1st objector company, following selling off their shares. It was further averred that 2nd objector, Farah Mohammed, had not exhibited evidence e.g. by receipts, to show that the attached goods from a house at Karen belonged to him. The auctioneer suspected that Farah Mohammed (2nd objector) was being economical with the truth. He and Kheira were close relatives, he had learnt from the latter.

Then Kheira's lawyers M/s Gachie Mwanza & Co. Advocates filed an unsigned and undated notice of motion on 16.8.11 offering to liquidate the decretal sum herein sh. 6,176,428/87 by instalments. The motion is apparently still pending. The same Kheira swore what was called a "further affidavit" which appeared to respond to Samuel Gathogo's replying affidavit above, stating that the 1st objector being a limited liability company, is a separate entity from its directors and so its assets cannot be applied to the directors' personal debts. That is a statement of a principle in company law. She denied that she told the auctioneer that the properties attached belonged to her. She did not dispose of her share in the 1st objector Master Commodities Ltd either. What the court seemed to gather from this affidavit is that Kheira was saying that the attached goods belonged to the 1st objector. She denied even ever having had discussions with Samuel Gathogo.

Directed to submit Mr. Thuku on behalf of the objectors maintained that the attached goods belonged to his clients. That the 1st objector had exhibited a lease agreement and a licence from city council to operate from the subject premises. Although it had transpired that the judgement debtor was a director of the 1st objector, her shares there could not be attached to satisfy any decree against her – until and unless the veil of the 1st objector was lifted. It was added that the 2nd objector had also deponed that some of the goods proclaimed were his property from his house at Karen. 2 cases were cited.

On behalf of the decree – holder, Mr. Gaturu reproduced provisions of Order 22 rules 51, 52, 54 Civil Procedure Rules regarding objection proceedings in respect of goods attached in execution of a decree. He urged the court to note that a 14 – day stay of execution was never issued and the decree – holder was never called upon to intimate in writing whether he intended to proceed with the execution after an objection was lodged. Such vitiated the course of objection. It ought to be struck out.

Mr Gachie had this to say on behalf of the judgment – debtor. It appeared to support the objector's case that the attached goods in the café belonged to the 1st objector, a limited liability company – separate and distinct from the judgement debtor Kheira – its director/shareholder. And that there was evidence that the goods attached at the Karen house belonged to Farah who had a title over that house. She, in any event, had proposed to liquidate the decretal sum herein in instalments.

Beginning with the relevant provisions of Order 22 Civil Procedure Rules applicable here:-

“ 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 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 persons makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven (7) days from the date of filing on all the parties.”

From the proceedings as laid out wef 27.7.11, it is clear that the objectors served no notice in writing on the court and all parties involved or any objection to the whole or part of the proclaimed/attached property. By such notice the court and the parties are alerted that the intended execution faces some hitches with a likelihood of stalling or even being reversed.

Rule 52:

“52. Upon receipt of a valid notice and application as provided for under rule 51, the court may order a stay of execution for not more than 14 days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all parties in writing within 7 days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.”

This rule needs no expansion or explanation.

Rule 54:

“54. If the attaching creditor proposes pursuant to rule 52, the intimation shall be accompanied by a replying affidavit and the court shall proceed to hear the application expeditiously.”

It is clear here the procedure adopted by the objectors lies way outside what is set down by the law in all its mandatory aspects. This application is thus fatally flawed and is struck out with costs to the decree holder.

The court however wishes to add that it was left with the impression that the judgement - debtor and the objectors approached this matter least inclined to be truthful and forthright. There was no evidence that the so - called 1st objector was incorporated as a limited liability company. Neither objector filed evidence e.g. receipts, of ownership of the proclaimed/attached property. And it appeared that the objectors and the judgement-debtor were bent on acting in concert and collusion to mislead the court and frustrate the execution put in place by the decree holder – not very admirable way to approach a court or tribunal.

In sum, this application is dismissed with costs to the decree-holder.

Delivered on 4.10.11.

**J. W. MWERA
JUDGE**