



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1902 of 2001

JACINTA M. WANJIRU)
LUCY MUTHONI T/A ..) PLAINTIFF
NJEMUWA INVESTMENTS LTD)

VERSUS

C. P. WAITHAKA..... 1ST DEFENDANT
SAMUEL MWAURA..... 2ND DEFENDANT
FALCON KENYA LTD 3RD DEFENDANT

RULING

Coram: Mwera J

Mr Musyoka for defendant/applicants

Mr Njiru for plaintiff/respondents

The 2nd defendant filed a notice of motion dated 15.12.09 under Order 21 rule 7 (2), 18, 21 Civil Procedure Rules and Rule 12 of the Auctioneers Rules, 1997. He prayed that the warrants of attachment issued to M/s Metropolitan Auctioneers on 26.11.09 to be executed over his property be set aside in that they were illegal as per the Auctioneers Rules and that therefore his attached goods ought to be returned.

The illegality of the said warrants was based on a claim that they were reissued following the plaintiff/respondent's lawyers letter dated 25.11.09 to the court. Further, that the attachment was not preceded by a 7-day notice always set out in a proclamation to attach goods in execution. And that since the decree involved was more than a year old the process to execute it ought to have been preceded by a notice to show cause which was not the case here. That there had been a previous attachment of the 2nd defendant's goods which were sold. Fresh warrants should not have issued for the present attachment except that the original warrants ought to have been returned to court and then endorsed for the attachment now in dispute. There was a supporting affidavit on which Mr Musyoka relied. On the plaintiff /respondents' part Mr Njiru filed a replying affidavit and resisted the motion.

Mr Musyoka argued that the judgement herein issued on 6.6.02 and a decree followed on 12.6.03 against the 2nd defendant. There was a first execution in June 2003, a second one in July 2006 and the 3rd one - now disputed, on 10.12.09. The decretal sum was Sh 2m. The applicant's motor vehicles were attached and sold. No return of that process was made to the court. To him, the 2 previous attachments should have been returned to court, and endorsed before a further execution was put in hand. It was further argued that under Order 21 rule 18 Civil Procedure Rules, the decree which has not been unexecuted for over a year, could only be validly executed first by

issuing a notice to show cause to the applicant/judgement –debtor, computing time from July 2006 when the 2nd execution was effected. Otherwise the subject attachment in December 2009, took the applicant unaware of any sums he owed.

Then on 25.11.09 Mr Njiru dispatched to the court a letter requesting that a fresh warrant be issued. The court improperly acted on it and execution followed even without prior proclamation giving the 7 days notice before actual attachment. Mr Musyoka stated that his client denied having been served with the documents of proclamation on 30.11.09 wherein it was claimed/certified that he declined to acknowledge the proclamation by signing on the copy. That was not right yet one, Alphonse Kioko, did sign as his agent when the goods were attached. He was helpless in the presence of auctioneers.

Mr Njiru did not agree with Mr Musyoka. To him, after the decree was extracted on 12.6.03 M/s Warleen Traders levied execution twice against the defendant by attaching his 2 motor vehicles and realizing not more than Sh. 178,000/= from a sum of Sh. 2m which, with costs and interest now stands at Sh. 7,736,576/=. At no time did the applicant raise the issue of fresh warrants to attach. Then applicants' goods were attached but his wife filed an objection to that on 1.7.08. That stalled everything and even to date their application has not been prosecuted. So on 30.11.09 the respondents applied afresh for execution. Mutungi J. as he then, was once, rejected an application on 25.11.09 based on reissue of warrants in that such process was not provided for by law. So on 26.11.09 the respondents properly filed a proper application to issue a fresh warrant of attachment – now under review.

To this counsel the execution process had been going on all the while without so much as keeping the decree dormant for a year, then waking up to execute it before issuing a fresh notice to show cause why execution should not be effected. He added that from the execution attempt which was stopped by the 2nd defendant's wife on 1.07.08 up to the present attempt, a year had not expired with the decree lying dormant. Indeed if the decree fell in a category requiring a notice to show cause to precede execution and such notice was dispensed with under Order 21. rule 18 Civil Procedure Rules, the court would be obliged to record the reasons for such dispensation.

As for the proclamation Mr Njiru maintained that it was served on the 2nd defendant/applicant but he declined/refused to acknowledge – a fact that the auctioneer gave a certificate for. After 7 days the goods were attached and this time Alphonse Kioko, the applicants agent duly signed. If indeed this proclamation was said to have been falsely certified as to the applicant's declining to sign it, he should have done well to have the auctioneer examined on oath on his certificate. The court heard that in fact the initial attachment of June 06, followed a notice to show cause dated 6.03.06 yet the applicant chose not to appear and oppose it as to the value claimed or the validity of the notice. All in all the applicant has been in the know of what has been taking place and so he will suffer no prejudice if the present process proceeds.

In the court's view it finds that the execution against the applicant started off properly with a notice to show cause. The decree was extracted on 12.6.03. The first execution was in June 2003. But when a balance of the sum was to be executed for in July 2006, Mr. Njiru told the court and Mr Musyoka did not dispute that, a notice to show cause issued against the applicant on or/about 6.3.06 and it was heard on 14.6.06. The applicant did not appear to dispute or oppose it. So proper execution had commenced.

And when another execution was attempted on 29.5.08, the applicants wife objected to the attachment by an application dated 1.07.08. It cannot thus be said that when all this was going on the applicant was ignorant of the process. Then his wife has so far not prosecuted her objection. The applicant did not disclose either, the issuance of the notice to show cause or the objection by his wife. Then since 1.07.08, the respondent filed an application to issue fresh execution papers in November 2009. That is what a worried creditor to the tune of Sh. 7.7m ought to do: to pursue his rights.

Then two questions of proclamation:

From the annexures filed, this court was satisfied that one was served on the applicant on 30.11.09. He refused to sign the process

and the auctioneer made a certificate to that effect. If it was false, the applicant should have opted to have him examined on oath about it. He did not, and from the conduct of concealment of other aspects earlier stated this court is minded to hold and it holds that the goods attached this time round were properly proclaimed and were attached some 12 days later when one Alphonse Kioko an agent of the applicant signed the warrant of attachment on 10/12/09.

All in all the court has the impression of the applicant as a debtor all the time well aware of what obligation he has to discharge towards the respondents: to pay the sum now standing at Sh. 7.7m. But he has chosen the course to frustrate all that – a thing this court finds difficult to countenance. This application is accordingly dismissed with costs.

Orders delivered on 2/2/10.

J. W. MWERA
JUDGE