



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 329 of 2003

AWO SHARIFF MOHAMED.....PLAINTIFF/DECREE HOLDER

VERSUS

ABDULKADIR SHARIFF ABDIRAHIMDEFENDANT/JUDGMENT DEBTOR

AND

ECO BANK KENYA

LIMITEDOBJECTOR

RULING

1. These are objection proceedings taken out by ECO Bank Kenya Limited by way of a Chamber Summons dated 11th December 2009. The Objector seeks for an order that there be a stay of sale over plot known as LR NO.37/262/3 and the sale of the property be lifted and set aside. The application is predicated on the grounds that LR NO.37/262/3 is charged to the objector vide a charge registered on 2nd July 2008. The objector contends that the intended sale is bad in law. The decree holder has no power to attach the property which was charged to the objector.
2. The above grounds are elaborated in greater details by the matters deposed to in the supporting affidavit by Mr. Wilfred Oroka. He has annexed to the affidavit a copy the charge dated 2nd July 2008, which was executed by the defendant as the chargor and SASA General Investments Ltd is the borrower. According to the copy of an abstract of the title, the charge was registered on 5th November 2008. There is also another abstract of title which shows an entry of a prohibitory order issued in this particular suit which is cancelled out.
3. This application was opposed by the decree holder, Mr. Wamalwa counsel for the decree holder relied on the affidavit by Towhida Awo Shariff sworn on 15th December 2009. It was submitted that this particular objection is incompetent because a similar application was brought by the judgment debtor and SASA General Investment Limited seeking for an order that there be a stay inter alia, of the sale of LR NO.37/362/3 and they also sought to set aside the sale. That application was heard by Lesiit J and by Her Ladyship's ruling delivered on 10th July 2009, that application was dismissed as lacking in merit.
4. That application was made by SASA Investment ltd, the entity named as the borrower as one of the objectors on the grounds that it had charged the subject title to ECO Bank Kenya Limited. Now the parties have changed positions and ECO Bank Kenya Ltd, who are the chargees have come to court to make a similar application over the same subject matter. According to counsel for the decree holder, this matter is res judicata as provided for under section 7 of the Civil Procedure Act especially explanation (6)

which provides;

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and other, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

5. It is also important to point out that the chargor is the judgment/debtor and when the charge was created all the parties were privy to the judgment creditor's interest over the property. The objector in this matter was aware of these execution proceedings. The objector had notice of the decree and as they fully participated in this court to answer and represent themselves in the garnishee proceedings. Subsequently and while knowing about the decree holders claim, and being aware of an existing prohibitory order which was issued by this court over the subject title, the objector took a risk to charge the property.

6. The entries which were entered on the register of lands before the registration also cancelled. Although counsel for the objector submitted the entry of the prohibitory order was not signed one wonders why it was entered in the register in the first place and why it was cancelled and eliminated from the records altogether. The court was urged not to be made a rubber stamp of fraudulent transactions. Moreover, no notice was filed of the objection proceedings as provided for under Order XXI r.53 of the Civil Procedure Rules. The objector merely proceeded to file the Chamber Summons without following the laid down procedure.

7. Lastly this application was also challenged because the affidavit in support of the application that is sworn by one Wilfred Oroka does not show the source of his authority. There is nothing to show the affidavit was sanctioned by the Board of the Directors of the Objector, the court was urged to find the affidavit is bad in law and strike the application.

8. I have gone over the previous proceedings in this matter since the judgment was rendered by Kasango J. on 16th February 2006 I have come across almost a dozen applications which have been filed in this matter in regard to execution proceedings. Most of these relate to objection proceedings either brought by the judgment/debtor and other entities related to him. The question that lingers in my mind is whether these objections are contrived to defeat the interest of the decree/holder from realizing the fruits of his litigation? Are all these proceedings made to scuttle the execution of the judgment which has not been set aside in the last almost four years?

9. It is also evident from these applications that the objectors are just changing positions. As it was correctly pointed out by counsel for the judgment/creditor, in the objection proceedings that were filed on the 6th February 2009, the borrower was an objector objecting to the sale of the same property known as LR NO.37/362/3. The court dismissed that application and strictly going by provisions of section 7 the res judicata rule, the issue over this property was substantially determined in that previous application.

10. Even if the court was wrong on that issue, another issue that causes me considerable concern is the fact that the present objector has been involved in these execution proceedings defending the Garnishee order they participated in these proceedings as the 4th Garnishees and it is evident that from those proceedings go way back to July 2007 when they must have become aware of the decree/holders claim against the defendant who is the chargor. Moreover a prohibitory order was issued by this court, and the extract of title shows the entry was entered in the Lands Register but it was canceled after which a charge by the judgment/debtor and a previous objector SASA Investment Limited as the borrower was

registered.

11. This questions still persist and at this stage it appear obvious that the objector was aware of the existence of the decree holders claim over the suit property and was more probably than not aware of the prohibitory order. Thus the objector took part in a fraudulent transaction which was entered into with the judgment debtor, and the borrower with the intention of aiding the Judgment debtor to avoid the execution of the decree herein. The Court of Appeal in the case of Mapis Investment (K) Ltd v Kenya Railways Corporation (2005) 2KLR page 410 their Lordships held that:-

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him”.

12. The last issue which was raised was in regard to the procedure adopted by the objector to file this objection. Under order XXI rule 53 of the Civil Procedure Rules, an objector is supposed to issue a notice in writing to the court upon receipt of the notice the court is supposed to issue a stay of execution proceedings and the court is supposed to call upon the attaching creditor within 15 days or any other time prescribed by the court to state whether they propose to proceed with the attachment. This objection is dated 11th December 2009 it was filed together with the chamber summons. I agree with counsel for the decree/holder that this objection proceedings was not made in accordance with the provisions as laid down in the law.

13. In view of all the above reasons this application should be dismissed with costs to the judgment/creditor.

RULING READ AND SIGNED ON 5TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE