



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Civil Case 53 of 2006

**PATRICK ISAGARA & ANOTHER.....PLAINTFFS/RESPONDENTS
~VRS~
SCANDINAVIA BUS SERVICES.....DEFENDANT/RESPONDENT
CMC MOTORS GROUP.....OBJECTOR/APPLICANT
RULING**

This is a ruling on the Objector's application dated 2nd May, 2008 seeking for orders that the attachment of the Objector's moveable properties, motor vehicles registration numbers KAU 132 J and KAU 133 J be raised. It also seeks for costs of the application.

Mr. Kimanga for the Objector argued the application while the Respondent/Plaintiffs were represented by Mr. Ocharo Kebira. The Defendant through his advocates Wetangula & Co. Advocates intimated that he had no interest in the application.

The grounds supporting the application are that the objector CMC Motors Group entered into a financial facility with the Defendant Scandinavian Express Bus Service in 2005 for sale and delivery of ten (10) Nissan Buses Model CB 46. The transaction was entered into pursuant to a director's guarantee by the Defendant to the Objector in the year 2000. The buses were delivered to the Defendant and include the two vehicles under attachment by the Respondents. The vehicles are under a purchase agreement and were never paid for in full. The Objector therefore holds lien on the two vehicles until payment in full. The Objector was not served with any notice for attachment nor is he a party to the suit.

The Respondents opposed the application. Mr. Ocharo argued that the documents relied on are not admissible since some have not been signed by the parties or have not been made in compliance with the law. The hire purchase agreement has not been annexed to the application. Neither has the Objector shown whether the said agreement was registered in accordance with the provisions of section 5 of the Act. The log books are not reliable as proof of ownership and the Objector ought to have produced copies of records from the Kenya Revenue Authority which would show the current registration status. Mr. Ocharo referred the court to some authorities to support his argument.

The Applicant has attached a list of the ten buses which it delivered to the Defendant in the year 2005 and the guarantee for deliver which is undated and signed by one Mohammed Abdulla in the year 2000. The sale invoice for the two buses in issue herein and transfer forms duly signed are also annexed. Hire purchase agreement and its registration have not been annexed as contended by the Respondents. The supporting affidavit by one Anthony G. Mbutia the Credit Controller of the Objector explains that the transaction was entered in pursuance with the director's guarantee signed in the year 2000. I do not find any problem with this kind of arrangement provided the parties had agreed to use an earlier guarantee in the 2005 transaction. In this case the court had ordered attachment of the Defendant's vehicles in favour of the Respondents for the decretal sum of over Ksh.11,000,000/=. One of the buses registration number KAU 136 J was sold earlier before these objection proceedings were filed. About half of the decretal amount remains unpaid.

The counsel for the respondents did not disclose the status of the two vehicles registration number KAU 132 J and KAU 133 J. It is however, assumed that the vehicles are still in safe custody awaiting the outcome of these objection proceedings. Order 21 Rule 54 provides that a stay shall issue on filing of such proceedings. The court record shows that stay was granted on the 16/7/2009.

The question which arises herein is whether the Applicant who has a lieu over the attached goods has priority over an executing creditor in case of a hire purchase agreement. It has been argued that the hirer in such an agreement obtains some kind of a limited property in the subject matter. However, failure to annex the hire purchase agreement places the Objector's case at a disadvantage. A hire purchase agreement normally has clauses to the effect that on seizure of goods in execution, the agreement shall automatically determine. In the absence of that agreement, this court may not be in a position to analyze its provisions. The court will therefore weigh the interest of the Objector over that of the Respondent.

I am advised by the finding in the case of **KAHAGI -VRS- ... KENCITY CLOTHING LTD HCCC NO.583 OF 1974** where it was held that an executing creditor has priority over a debenture holder over attached goods which have been seized before the debenture crystallized. In this case, the goods had been seized before the debenture holder appointed a receiver manager. It has been established in decided cases that the interest of a debenture holder is only equitable while that of an execution creditor is a legal one.

In view of the foregoing coupled with the fact that the object did not annex the hire purchase agreement and did not prove registration of that agreement, this application must fail. I find no merit in the objection and I dismiss the application with costs to the Respondents.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed this 29TH day of APRIL 2010.
In the presence of MR. OCHARO FOR PLAINTIFF