



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Judicial Review 13 of 2002**

**IN THE MATTER OF: AN APPLICATION BY ALI SEIF, BENSON WAIRAGU and JOSEPH  
NGETHE GITAU**

**AND**

**IN THE MATTER OF: AGA KHAN PRIMARY SCHOOL NAIROBI**

**AND**

**IN THE MATTER OF: AGA KHAN EDUCATION SERVICE KENYA**

**AND**

**IN THE MATTER OF: THE MINISTER FOR EDUCATION**

**AND**

**IN THE MATTER OF: THE EDUCATION ACT (CAP 211 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: OBJECTION PROCEEDINGS UNDER ORDER XXI OF  
THE CIVIL PROCEDURE RULES**

**BETWEEN**

**SABAH KHAMIS OMAR ..... OBJECTOR**

**AND**

**AGA KHAN PRIMARY SCHOOL**

**AGA KHAN PRIMARY SCHOOL NAIROBI..... DECREE HOLDERS**

**AGA KHAN EDUCATION SERVICE KENYA**

**RULING**

Having lost in this cause **ALI SEIF, BENSON WAIRAGU** and **JOSEPH NGETHE GITAU** became the judgment debtors. Attachment issued and several items of office furniture and equipment, which were in possession of **ALI SEIF**, were proclaimed upon by Dalali Traders Auctioneers on 7/12/2009, from an undisclosed location but one can safely assume that it was from an office because, the auctioneer indicated on the proclamation form that a copy of it was '*left with the office assistant*'.

His wife **SABAH KHAMIS OMAR** ('the objector/ applicant') who pleads Order 53 rule 1 of the Civil Procedure Rules ('CPR') moved this court on 13/1/2010, seeking an order to raise the said proclamation, and to release all the proclaimed properties to her unconditionally. She also prays for costs.

She claims that she is not a party to the suit also relies on the grounds that:

- *All the properties proclaimed as aforesaid belong to and are wholly owned her.*
- *The attachment is therefore wrongful.*
- *It is in the interest of justice that the said attachment is lifted and the said properties are released to her.*

The application is however opposed by **AGA KHAN PRIMARY SCHOOL, AGA KHAN PRIMARY SCHOOL NAIROBI** and **AGA KHAN EDUCATION SERVICE KENYA**, who are the decree holders in this suit and hence the respondents in this application. It is their grounds that:

- *The applicant has failed to prove that the attached properties belong to her to the exclusion of her husband.*
- *The fact that the attached properties were found at his place of work, and in his use is incontrovertible proof that she did not enjoy exclusive ownership of the properties.*
- *It is trite law that matrimonial property, particularly furniture, is now owned by one spouse to the exclusion of the other, whether the same was acquired by one spouse.*
- *This is an attempt to deny the respondent the fruits of the Judgment and a reimbursement of the costs incurred and duly taxed.*

The respondents are of the view that having been in the possession and use of the judgment debtor (Ali Seif), the presumption would be that he would be at the very least, the beneficial owner of the same.

Order XXI rule 53 (1) and (2) of the Civil Procedure Rules ('CPR'), which the objector relies on provides that:

*'(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 the decree-holder of his objection to the attachment of such property.*

*(2) Such notice shall contain the objector's address for service and shall set out shortly the nature of the claim which such objector or person makes to the whole or portion of the property attached'.*

The objector who seems to be aware that she must prove on a balance of probability that she is entitled to, or that she has a legal or equitable interest in the whole of or part of any property attached in execution of the decree, has attached several receipts to show that she procured the following items of furniture on 14/2/2008 and 16/2/2008 from Nakumatt Junction:

Shaped table (secretarial),  
3 Office chairs,  
One walnut conference table,  
One office leather seat,  
One table, and  
One executive table.

The respondents are however of the view that most of the items are not included in the receipts and that in any event, plain receipts are not conclusive proof of exclusive ownership.

I have considered the pleadings as well as the submissions of both counsel, and I am convinced that the above items which were proclaimed from the debtors business premises, and not his matrimonial home, belong to the objector who having claimed that she had acquired the items to enable her furnish a ladies' designer/beauty consultancy which did not take off to a number of constraints and that she in the meantime allowed her husband to use the same, has ably demonstrated that she was the one who actually acquired them and that though possession and use could prove ownership, she has been able to show that having acquired them, she has an equitable right over them. I am convinced that her interest in the specified items would make the judgment debtor's possession of them not on his own account but on account of or in trust for her.

I therefore find that she has been able, on a balance of probability to establish her case, and I do allow this application and order that the proclamation of the aforementioned, the secretarial table, the three office chairs, the walnut conference table, the office leather seat, the one table, and the executive table, be lifted and that they be released to this applicant unconditionally.

Cost shall however be in the cause.

Dated and delivered at Nairobi this 26<sup>th</sup> day of May 2010.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of:

For the applicant – Mrs. Kinyanjui

For the respondent – Mr. Mbaluto