



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI
Civil Case 175 of 2009

ELIAS KAMAU MUTHONI.....PLAINTIFF/APPLICANT

VERSUS

JORUTH ENTERPRISES LIMITED.....DEFENDANT/RESPONDENT

AND

GROFIN KENYA LIMITED.....1ST OBJECTOR

GROFIN EAST AFRICA LIMITED FUND.....2ND OBJECTOR

RULING

Pursuant to the provisions of Order XXI rule 71 of the Civil Procedure Rules as read together with rule 17 of paragraph 4, 5 and 6 of the Auctioneers Act No. 5 of 1996, the purchaser herein, Amrital Purshottam Devani, took out the motion dated 12th May 2010 in which he prayed for the following orders:-

1. **THAT the application be certified as urgent and service of the same be dispensed with.**
2. **THAT the sale of motor vehicle Reg. No. KBD 891D – make AXOR PRIME MOVER and Trailer Registration No. ZC 9133 MAKE BHACHU sold by Public Auction on 10th May 2010 be confirmed and made absolute in favour of the purchaser, Amrital Purshottam Devani.**

The application is supported by the affidavit of Anthony Mwangi Ng'ang'a, an advocate of this court appearing for the applicant.

The main grounds put forward in support of the motion are that the sale was carried out pursuant to warrants of attachment and sale and the purchaser complied with the terms and conditions of the sale. It is stated that the purchaser has paid in full the purchase price and that no application to set aside the sale has been made.

This motion is ex parte in nature. The material placed before me reveals that the warrants of attachment and sale were issued on 20th March 2010. It is also evident from the record that Grofin (K) Ltd and Grofin (E.A.) Ltd Fund, being the 1st and 2nd objectors herein, filed objection proceedings on 20th April 2010. In response, the plaintiff filed a notice of intention to proceed on 28th April 2010 which notice was served upon both the defendant and the objectors herein. When the suit came up for the hearing of the objection proceedings on 6th May 2010, the objectors' advocate successfully sought for leave to withdraw the objection proceedings. It would appear on 7th May 2010, Kinyua & CO Auctioneers advertised for sale by public auction the attached motor vehicle and trailer for 10th May 2010 vide the Kenya Times Newspaper. The property was finally sold when there was no objection. The purchaser is now before this court seeking for an order to make the sale absolute. I have perused the provisions of Order XXI rule 71 of the Civil Procedure Rules and it is clearly stated that the court may

make an order vesting the movable property in the purchaser or as the purchaser may direct and such property shall vest accordingly. It is not in dispute that the property attached and subsequently sold is motor vehicle registration No. KBD 891D – make Axor Prime Mover and Trailer registration No. ZC 9133 make Bhachu. The motor vehicle and trailer were sold by public auction. This court is being requested to confirm the sale and to make it absolute in favour of the purchaser.

In my view I find the application to be without merit. I have two problems which I think will deny the applicant the orders. First, is that the affidavit filed in support of the motion is sworn by Mr. Anthony Mwangi Nganga, learned advocate for the plaintiff. Mr. Nganga has deponed on facts which may not be within his knowledge. A careful perusal of the averments in paragraph 7 of the supporting affidavit will reveal that Mr. Ng'ang'a deponed that the motor vehicle was sold to one Amrit Purshottam Devani. He heavily relied on the returns filed with the Deputy Registrar of this court. Mr. Ng'ang'a does not state whether or not he attended the public auction. He does not disclose the sources of his information. Of course the documents attached therein indicate that they were copied to his firm, M/S Ng'ang'a Munene & CO Advocates. In such a case it was incumbent upon the learned advocate to secure the affidavit of the proprietor or a member of staff of Kinyua & CO Auctioneers who participated in the public auction. This in my view enjoins me to deny the purchaser the order sought. The second reason that has compelled me to deny the applicant the order is that there is no evidence put before me to prove that the property sold is owned by the defendant. I expected the auctioneer to furnish this court with a search certificate from the registrar of motor vehicles. It is possible that the motor vehicle sold belongs to third parties who are not parties to this suit. It can as well be a partnership property hence such a sale can be viated under Order XXI rule 44 of the Civil Procedure Rules. I believe that the law envisaged such lapses to occur in a sale and that is why provisions to confirm the sale and to make the same absolute were provided for. In the end I am convinced that the motion does not meet the threshold of the law. I dismiss the motion with no order to costs.

Dated and delivered at Nyeri this 18th day of May 2010.

J.K. SERGON

JUDGE