



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 48 OF 2008

C. K. PATEL LTD.....PLAINTIFF
VERSUS
RECCO BUILDERS LTD.....DEFENDANT

RULING

Before me are objection proceedings filed by Sohan Singh Rehal trading as Sohan Singh Rehal Building Contractors, the objector/applicant herein. A notice of objection was filed on 20/8/2010 and a notice of intention to proceed with attachment was filed by the plaintiff/decreed holder on 17/8/2010. The objector denies that the said notice was ever served on the objector’s counsel, but while perusing the court file on 23/8/2010, counsel noted the notice of intention to proceed with attachment. The objector then filed the chamber dated 31/8/2010, seeking the lifting of attachment of the motor vehicles KXJ 254 Bedford Lorry, KAL 840F (Isuzu TFR P/UP), KAH 480A (Toyota Corolla Saloon), KAC 735F (Subaru P/Up), KAK 448W (BMW Saloon), Unregistered Leyland Tipper KG 1227, all the other items named in the Chamber Summons. On 4/11/2010, the plaintiff and auctioneer went ahead to advertise motor vehicle KAL 840F for sale whereas it formed part of the objection proceedings which were yet to be determined. The advertisement is exhibit SSR 2A. It is the objector’s contention that the vehicle was attached because it was previously owned by the defendants but she had purchased the said vehicle from the two defendants and has been repaying the loan owed to Delphis Bank. The objector exhibited the 2 agreements signed by the defendants (as Ex. 1a & b) annexed to the supplementary affidavit of the objector dated 18/11/2010. It was further contended that the said motor vehicle could not have been attached in any event, because Delphis Bank still had an interest in the vehicle and was still registered as one of the owners since the loan it had advanced to the defendants for purchase of the vehicle was not fully paid. It was further submitted that the defendant could only have proceeded with attachment after identifying who owned the property in question. It was also submitted that since the 2nd respondent has a receiving order in Bankruptcy Proceedings, No. 41/2010, no proceedings can be maintained against him. Mr. Kanyi urged that before attachment, a search had to be done to ascertain ownership. That is what the court held in **NATIONAL BANK OF KENYA V INNOVATION ADVERTISING LTD & ANOTHER HCC 79/03**. In **CATHERINE WAMBUI & WACHIRA V KENYA COLD STORAGE (FOODS) LTD CA 435**, the court held that where there is joint ownership and one party, is not part of the proceedings, the property can not be attached.

Mr. Wachira counsel for the defendants filed a preliminary objection to the effect that the proceedings which gave rise to this execution are in breach of **Section 9** of the **Bankruptcy Act Cap 53 Laws of Kenya** in that no proceedings can be maintained against a person who is declared bankrupt; That the 2nd Defendant/Judgment Debtor was declared bankrupt and the receiving order was forwarded to the court on 15/10/2010. Counsel urged that if any party wanted to proceed against the said 2nd defendant, then he has to join the official receiver of the person declared bankrupt to these proceedings.

Mr. Kipkoech, counsel for the plaintiff questioned who had instructed Mr. Wachira to appear for the 2nd defendant if the 2nd defendant is not in a position to instruct a lawyer. Counsel also argued that the plaintiff changed its mode of execution and a warrant of arrest has been issued against the 2nd defendant. The counsel also took up the point that the objection proceedings were filed outside the 10 days allowed by **Order 21 Rule 57** of the **Civil Procedure Rules** and that renders the application bad in law and incompetent. He said that no application was made for extension of time and this application is therefore an abuse of the court process. He submitted that though the objection proceedings were filed on 31/8/2010, they were not served till 25/10/2010.

Mr. Kipkoech further submitted that the defendant is being denied its fruits of judgment. He said that they got a notice to show cause to issue against the 2nd defendant on 12/10/2010 and on 15/10/2010, the 2nd plaintiff was served with a receiving order. The 2nd defendant is a director of the 1st defendant and the corporate veil can be raised under Order 21 of the Civil Procedure Rules. He argued that the 2nd defendant was aware of the filing of this case and arranged to dispose of the vehicle to his mother to avoid the decree. Counsel also objected to the supplementary affidavit dated 10/11/2010 but Mr. Kanyi urged that leave of court was granted to the Decree Holder to file a further affidavit with leave to the objector to file a further affidavit within 3 days.

Notice of intention to proceed with attachment was filed in court on 17/8/2010. The Decree Holder sent the said notice to the advocate of the objectors by registered post on 18/8/2010 {DMP II(a) & (b)}. The objectors deny having received the said notice but they perused the file on 23/8/2010 and found the notice of intention to proceed with attachment filed. They did not take any steps to file the substantive Chamber Summons to challenge the attachment, till 31/8/2010. No explanation was given it took a whole 7 days to file the application objecting to the attachment. Since the postage of the notice of intention to proceed with attachment was made on 18/8/2010, it was expected that it would be received within about 21 days which would be sometime early September 2010. The vehicle was attached and advertised on 4/11/2010 over a month since the intention to proceed with attachment was filed. All the above notwithstanding, I do find that the objector was not properly served with the notice of intention to proceed with attachment. Even though the objector's office was based in Karatina, the Decree Holder should have attempted personal service on the objector's counsel before posting the notice. Attachment of one's property is so serious that personal service on the advocate should have been preferred. I will find that the objector was not duly notified of the intention to proceed with attachment as required.

Counsel for the 1st defendant took up a preliminary objection that the 2nd defendant was declared bankrupt vide the receiving order dated 13/10/2010. Under **Section 9** of the **Bankruptcy Act**, no proceedings could have been maintained against the 2nd defendant during the existence of the receiving order, unless with leave of the court, the official receiver was made a party to the proceedings. **Section 9(1)** reads:-

“On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.”

The receiving order had been filed in this court by 15/10/2010. The plaintiff purported to attach and advertise the vehicle attached pursuant to proceedings against the 2nd defendant on 4/11/2010 but that could not be maintained. The attachment was irregular and illegal in view of the receiving order

The objector, by the two agreements exhibited (SSR1A & B) claims to have bought the vehicles from the defendants and the vehicle is now jointly owned by her and Delphis Bank because she is still paying a loan which the defendants took from the said Bank. Delphis Bank is a joint owner of the vehicle and is not a party to these proceedings, and therefore the vehicle could not be attached. The objector does have a legal interest in the attached vehicle and another party not before court. That is evidenced by the search certificate from Kenya Revenue Authority dated 1/10/2010 – PMP1. Even if the objector had not

purchased the vehicle from the defendants, the same could not be subject of attachment because Delphis Bank is a joint owner and not party to these proceedings (**CATHERINE WAMBUI WACHIRA case**). Had the plaintiff conducted a search at Motor Vehicle Registry (KRA) this attachment would not have taken place.

In respect of the objection to the further affidavit filed by the objector on 8/11/2010, this court granted leave to the objector to file a supplementary affidavit in response to the defendant's further affidavit. It is properly on record.

For all the foregoing reasons, I find that the attachment of the vehicle in question is irregular and is hereby lifted and set aside. The plaintiff will pay the costs of attachment including the auctioneer's costs.

DATED and DELIVERED this 17th day of December, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kipkoech for the plaintiff.

Mr. Kanyi for the defendant.

Kennedy – Court Clerk.