



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL

Civil Suit 241 of 2002

ROT MEL LIMITED..... PLAINTIFF

VERSUS

INTERSTATE 2000 LIMITED..... 1ST DEFENDANT

SULEIMAN MBARUK

t/a TAWFIQ BUS SERVICE.....2ND DEFENDANT

AND

AL-KHALEEL TRANSPORTERS

FALCON COACH LIMITED

TAWFIQ BUS LIMITED, TANZANIA

SAID SLEYYUM.....1ST OBJECTOR

DIAMOND TRUST BANK LTD..... 2ND OBJECTOR

RULING

Diamond Trust Bank Kenya Limited, the 2nd objector herein filed an application pursuant to provisions of **Section 3A** of the **Civil Procedure Act** and **Order XXI Rules 56** and **57** of the **Civil Procedure Rules** seeking the order of this court to lift the proclamation of attachment dated 13th February 2009 and raise the consequential attachment in respect of motor vehicles registration Nos. KBB 093M, KBB 099M, KBB 094M and KBB 091M. The 2nd objector further prayed for an order of the court to compel, by mandatory injunction, Messrs Keysian Auctioneers to unconditionally release to the 2nd objector motor vehicle registration No. KBB 093M. The grounds in support of the application are on the face of the application. Essentially, it is 2nd objector's case that it partly owns the suit motor vehicles by virtue of the fact that it had financed its purchase. The 2nd objector contends that by virtue of hire purchase agreements it had entered between itself and Falcon Coach Limited, it was jointly registered as the co-owner of the suit motor vehicles. The 2nd objector argued that during the subsistence of the hire purchase agreements, the suit motor vehicles could not be attached in execution of any decree as against Falcon Coach Limited, the other co-owner of the said motor vehicles. The application is supported by the

annexed affidavit of Elizabeth Hinga, the head of debt recovery unit of the 2nd objector.

The application is opposed. Adi Vinner, the managing director of the plaintiff, swore a replying affidavit in opposition to the application. He deponed that in so far as the basis of the 2nd objector's objection to the attachment was the hire purchase agreements, the same was incompetent as the hire purchase agreement had not been registered pursuant to the relevant provisions of the **Hire Purchase Act**. He deponed that all the hire purchase agreements that the 2nd objector was relying in support of its claim of ownership of the suit motor vehicles were invalid as they had lapsed or were about to lapse. He swore that, as financiers, the 2nd objector's interest in the suit motor vehicles was in regard to the amount owed to it in respect of the sum that it had advanced to Falcon Coach Limited for the purchase of the suit motor vehicles. He was of the view that since the sum earlier advanced by the 2nd objector to the judgment debtor for the purchase of the suit motor vehicles had substantially been paid, in the interest of justice and fairness, the 2nd objector should be compelled to provide accounts in respect of the outstanding amounts owed by Falcon Coach Limited to enable the auctioneer proceed with the sale, pay off the 2nd objector, and subsequent thereafter apply the balance to satisfy the decree issued in favour of the plaintiff. He was of the view that the 2nd objector, as a financier, should not be allowed to frustrate the plaintiff from realizing the fruits of its judgment. He urged the court to dismiss the 2nd objector's application with costs.

At the hearing of the application, I heard the submissions made by Mr. Rimui on behalf of the 2nd objector and Mr. Wasonga on behalf of the plaintiff/decreed-holder. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the 2nd objector had established to the required standard of proof, ownership of the suit motor vehicles to entitle this court find in its favour and thereby lift the attachment. The facts of this application are more or less not in dispute. It is not disputed that Falcon Coach Limited purchased the suit motor vehicles substantially from loans which were advanced to it by the 2nd objector. Falcon Coach Limited, the judgment debtor herein, offered the said motor vehicles as security for the advance of the sums that were utilized in the purchase of the said motor vehicles. Falcon Coach Limited entered into hire purchase agreements with the 2nd objector in respect of the said motor vehicles.

During the subsistence of the said hire purchase agreements, the suit motor vehicles were registered in the joint names of Falcon Coach Limited and the 2nd objector. It is not disputed that the 2nd objector was so registered to secure its interest as the holder of the security that was created pursuant to the hire purchase agreements. Although the plaintiff argued that the hire purchase agreements were invalid by virtue of the fact that it was not registered as provided by **Section 5(1)** of the **Hire Purchase Act**, having read **Section 3(1)** of the said **Act**, I agree with the 2nd objector's submission that the **Hire Purchase Act** does not apply to Hire Purchase Agreements where the hirer is a body corporate. The **Hire Purchase Act** applies to Hire Purchase Agreements where the hirer is a legal person other than a corporate body.

It is not disputed that the plaintiff, as the decree holder, has acknowledged the fact that the 2nd objector is the co-owner of the suit motor vehicles, albeit in its capacity as the financier of the purchase of the said motor vehicles. The plaintiff proposed that the 2nd objector be compelled to disclose the outstanding amounts that it is owed by the judgment debtor in respect of the said motor vehicles so that the auctioneer, upon selling the suit motor vehicles, can be directed first to pay the said outstanding amount to the 2nd objector, and thereafter the balance be applied to satisfy the decree issued in favour of the plaintiff by this court. The proposal by the plaintiff, attractive as it may appear, will be in contravention of the law. As financiers of the said motor vehicles, the 2nd objector has a first lien over the suit motor vehicles. There is no evidence to suggest that the judgment debtor had defaulted in the repaying of the sum due to the 2nd objector, to entitle the said 2nd objector to re-possess the said motor vehicles as provided under the Hire Purchase Agreements. The 2nd objector has no dispute with the judgment debtor. This court cannot in the premises aid the plaintiff in the unlawful attachment of properties belonging to third parties in execution of a decree of this court.

I therefore hold that the 2nd objector has established ownership (*or as it were joint ownership*) of the suit motor vehicles to entitle it to a declaration by this court it co-owns the said motor vehicles. I think in the haste to execute against the judgment debtor, the plaintiff did not undertake due diligence to establish the legal ownership of the suit motor vehicles. If the plaintiff had done so, it would have been spared the inconvenience of the present proceedings and the resultant costs. Where it is established that a property is jointly registered in the name of a judgment debtor and another person, a decree holder cannot attach the said property in execution of a decree of the court. **Order XXI Rule 42** of the **Civil Procedure Rules** provides a procedure under which attachment can be effected on such property. It states that:

“Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment debtor prohibiting him from transferring the share or interest or charging it in any way.”

In the present application, the plaintiff was required to attach the suit motor vehicles by issuing a notice to the judgment debtor prohibiting it from transferring its interest in the suit motor vehicles pending satisfaction of the decree of the court. Instead of following the above procedure, the plaintiff chose the route that has now brought it grief.

In the premises therefore, I will allow the 2nd objector’s application dated 10th March 2009. The proclamation and attachment of the suit motor vehicles, namely motor vehicle registration Nos. KBB 093M, KBB 099M, KBB 094M and KBB 091M, in execution of the decree issued in favour of the plaintiff in this suit, is set aside. The attachment of the said motor vehicles is ordered lifted forthwith. The motor vehicle registration No. KBB 093M, which was taken possession of by Keysian Auctioneers in execution of the said decree, is ordered unconditionally released to the 2nd objector. The plaintiff shall pay the costs of this application to the 2nd objector and the costs of the auctioneer.

DATED at **NAIROBI** this **29TH** day of **APRIL, 2009.**

L. KIMARU

JUDGE