



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 132 of 2004

EXPRESS ADVERTISING CENTRE LTD.....APPELLANT

VERSUS

REAL ESTATES LTD.....RESPONDENT

J U D G M E N T

1. Express Advertising Centre Ltd (hereinafter referred to as the appellant), filed objection proceedings under Order XXI Rule 55, 56 and 57 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The objection related to an attachment in execution of a decree, in Milimani CMCC No.2810 of 2000, in which the respondent was executing a judgment delivered in its favour against Express Escorts Ltd (hereinafter referred to as the judgment debtor).

2. The objection was based on 3 grounds namely:

- (a) That the appellant was not a party to the proceedings.
- (b) That the appellant was the lawful proprietor of the items appearing on the proclamation.
- (c) That the attachment was illegal and wrongful.

3. The application was also supported by an affidavit sworn by M.S. Dhariwal, the Managing Director of the appellant. He swore that the appellant was a distinct and independent company incorporated under the provisions of the Companies Act. He maintained that the appellant was neither a subsidiary nor a nominee of the judgment debtor nor was it a party to the proceeding before the trial magistrate. Dhariwal further deponed that the attached goods were all purchased by the appellant. He annexed a copy of a letter from the appellant's auditors together with cash sale receipts, confirming that certain furnitures were purchased by the appellant. Dhariwal further deponed that the fax machine and the typewriters also belonged to the appellant although it was unable to trace the receipts of purchase.

4. In response Peter N. Gichuki, a licensed auctioneer practicing under the name of Spotlight Intercepts Kenya Ltd, swore that he proclaimed the goods from the offices of the judgment debtor in westlands where he found M.S. Dhariwal who is the managing director of the judgment debtor. Dhariwal complained that the insurance company had failed to satisfy the decree against them. He gave Peter N. Gichuki a copy of a letter copied to him from the Commissioner of Insurance in which Dhariwal's complaint against the insurance company for failing to pay the decretal sum was acknowledged. The auctioneer therefore maintained that the goods attached belonged to the judgment debtor.

5. In her ruling, the trial magistrate noted that the auctioneer's averments in the replying affidavit were

not controverted. She also found that the proclamation was carried out at the judgment debtor's premises, and that the appellant did not show that they operate from the same premises with the judgment debtor. The trial magistrate found that the receipt showed that the appellant bought property similar to the ones proclaimed, but they did not necessarily show that the judgment debtor did not have similar properties.

6. Being aggrieved by that ruling the appellant has lodged this appeal citing two grounds as follows:

(i) The learned Senior Resident Magistrate erred in both law and facts in holding that the proclaimed goods do not belong to the Objector (appellant herein).

(ii) The learned Senior Resident magistrate erred in both law and facts in holding that the proclaimed goods belong to the judgment debtor.

7. During the hearing of the appeal the respondent though served did not attend court. Hearing therefore proceeded *ex-parte*. In support of the appeal Mr. Rakoro who appeared for the appellant submitted that the trial magistrate failed to take into account the evidence of ownership which was exhibited before her. Relying on ***Brar vs Wareng Quarry Achare Construction (1984) KLR 705***, and ***HCCC No.4333 of 2001, Commerce Bank Ltd vs Caroline W. Wanjihia***, it was submitted that the trial magistrate failed to make a finding on the question of ownership.

8. I have carefully considered the objection proceedings, the submissions which were made before the trial magistrate and the submissions made before me. I find that the affidavit evidence before the trial magistrate showed that the goods were attached from the premises of the judgment debtor. It is also evident that Dhariwal who swore an affidavit as the managing director of the appellant was also the managing director of the judgment debtor. These were facts deponed to by the auctioneer who attached the goods. The facts were not denied by Dhariwal or the appellant, although Dhariwal had earlier claimed in his affidavit that the two companies were distinct and independent.

9. It was for the appellant who was alleging ownership of the attached goods to prove that fact. The appellant only relied on a letter purported to have been written by its auditors. There was however no affidavit from the auditor confirming the source of his information. Although some cashsale receipts were produced for some furniture, as observed by the trial magistrate, it was not possible to rule out the fact that the receipts did not relate to the actual goods attached.

10. It is evident that the appellant failed to prove on a balance of probability that the attached goods were wrongly attached or that the goods belonged to it and not the judgment debtor. In the circumstances, the trial magistrate was right in dismissing the objection proceedings. Accordingly, I find no merit in this appeal and do therefore dismiss it with costs.

Orders accordingly.

Dated and delivered this 18th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Adipo for the appellant

Advocate for the respondent absent

Erick – Court clerk