



AWO SHARIFF MOHAMED ..... PLAINTIFF

VERSUS

ABDULKASIR SHARIFF ABDIRAHIM ..... DEFENANT

AND

SASA GENERAL INVESTMENT LTD ..... OBJECTOR

## **RULING**

The chambers summons dated 21<sup>st</sup> May 2009 was taken out by **Dahir Shaariff Abdulkadir** seeking for orders that there be a stay of the sale of LR NO. 37/262/3 pending the hearing and determination of the objection proceedings. Secondly the sale of the aforementioned property be lifted and set aside. The application is predicated on the grounds that LR NO. 37/262/3 is charged to EABS Bank now Eco Bank Kenya Limited and the objector is the principle owner. The intended sale is said to be erroneous mischievous and advertised with malice. The application is supported by the affidavit of **Dahir Shaariff Abdulkadir** sworn on 21<sup>st</sup> May 2009.

This application came up for hearing on 24<sup>th</sup> September 2009. Counsel for the applicant applied for an adjournment on the grounds that Miss Wambui who was holding brief for Mr. Wachira was engaged in another court. The court declined to grant an adjournment and Miss Wambui indicated to the court that she was not in a position to argue the application. She however remained in court.

Mr. Wamalwa counsel for the respondent opposed the application. He relied on the replying affidavit sworn by **Isha Awo Shariff** who is one of the administrators of the estate of the late Awo Shariff Mohamed the plaintiff in this matter. Mr. Wamalwa drew the attention of this court to a ruling by Lesiit J delivered on 10<sup>th</sup> July 2009. In that ruling, the court held that LR NO. 37/362/3 should be determined in the objection proceedings. Under section 7 of the Civil Procedure Act, it is provided that

***“ No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such court.”***

***Explanation (3) the matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”***

He submitted that all the issues raised in this application were determined, and the attachment of the subject property was done. A prohibitory order was issued and registered on the property on 22<sup>nd</sup> September 2008 therefore a purported charge could not have been registered in the face of a prohibitory order which was never lifted by a court order. Counsel was of the view that the documents attached to the application were mere forgeries which were cut and pasted. That must also have been the reason why the objector and his advocate failed attend court to avoid offering an explanation of how the documents have been manipulated at the lands office.

In urging the court to dismiss the application, he pointed out that the purported charge also offends the provisions of section 3 of the Bankruptcy Act, as the chargor participated in the garnishee proceedings and therefore the charge was created to defeat the interest of the judgment creditor and should be voided.

This is an application by an objector who is seeking a stay of the sale over a property he claims to own. The applicant although represented by counsel failed to present any arguments in support of the application. In essence I should have dismissed the application for want of prosecution but since it was opposed, I will consider the merits as well. Miss Wambui who was detailed to hold brief remained in court and did not make any representation on behalf of the objector while arguing her instructions were limited to seeking an adjournment.

It is trite that the onus lies on the objector to prove to the satisfaction of the court that the attached property was wrongly attached and was owned by him. In this case, there is material to show that the judgment creditor had registered a prohibitory order on 24<sup>th</sup> September 2008, as entry No.24. He has annexed an extract of title of the suit premises. The objector has not demonstrated how he was able to purchase and register a charge over the suit premises before the prohibitory order was lifted by an order of the court. Even the extract of the title annexed to the application clearly shows there is a manipulation of the information which the objector ought to have explained. Apart from dismissing the application for want of prosecution, I find it lacks merits in the face of the replying affidavit and submissions by counsel for the judgment creditor.

The application is dismissed with costs to the judgment creditor.

RULING READ AND SIGNED ON 30<sup>TH</sup> OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**