



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 19 of 2004**

**H.S. JUTLEY INSURANCE BROKERS LTD.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**ENTERPRISE MACHINE TOOLS LTD.....DEFENDANT/JUDGMENT-DEBTOR**

**AND**

**JAGMOHAN SINGH GHATAURA**

**KARAMJIT KAUR GHATAURA.....OBJECTORS**

**RULING**

The application under consideration is the Chamber Summons by the Objectors dated 25<sup>th</sup> May 2007. The application is expressed to be brought under Order XXI Rules 56 and 57 of Civil Procedure Rules. It seeks only one prayer.

1. *THAT this Honourable Court be pleased to lift the Warrants of Attachment of movable property in execution of the decree herein and the subsequent proclamation of the Objectors' property.*

There are two grounds cited on the face of the application as the basis of the application.

- a) *THAT the Objectors are not party to the suit herein and the proclamation/attachment of their property is wrongful and illegal.*
- b) *THAT the property proclaimed/attached belong to the Objectors and not the Defendant/Judgment Debtor herein.*

The application is further supported by the affidavits of JAGMOHAN SINGH GHATAURA, the 1<sup>st</sup> Objector and KARAMJIT KAUR GHATAURA, the 2<sup>nd</sup> Objector. Both affidavits are dated 25<sup>th</sup> May, 2007. There is a further affidavit by the 1<sup>st</sup> Objector dated 14<sup>th</sup> May, 2008.

The application has been opposed.

The director of the Plaintiff, HARJINDER SINGH JATULEY, has sworn a replying affidavit dated 12<sup>th</sup> May, 2008.

I have considered the application, the pleadings and affidavits filed by both parties to this suit and submissions by Mr. Kamotho for the Objectors/Applicants and Mr. James Singh for the Respondent.

In brief, the facts of this case are that Kasango, J. entered summary judgment against the Defendant herein, ENTERPRISE MACHINE TOOLS LIMITED, in favour of the Plaintiff, H. S. JUTLEY INSURANCE BROKERS LIMITED on 9<sup>th</sup> November, 2004. Subsequent to the entry of Summary Judgment, the Defendant through, its Advocates Soita, Kimeu & Associates, filed a Chamber Summons application under Certificate of Urgency dated 17<sup>th</sup> February, 2005. In it, the Defendant sought a stay of execution of the decree and for leave to be allowed to liquidate the decretal sum in installments of Kshs.100,000/-. That application was not heard but instead the parties filed a consent order, which the court adopted on 19<sup>th</sup> January, 2006. In the consent order, the parties agreed to allow the Defendant's application dated 17<sup>th</sup> February, 2005 on certain terms. Some of the terms agreed upon was that the 1<sup>st</sup> Objector in this application, who is the Managing Director of the Defendant company, undertakes to personally guarantee that the post-dated cheques issued by the Defendant in settlement of the Plaintiff's claim, would be honoured. Indeed a personal guarantee by the 1<sup>st</sup> Objector under the common seal of the Defendant Company was executed by the 1<sup>st</sup> Objector. The respondent has annexed a copy of the personal guarantee in the Replying Affidavit as 'HSJ 5', under paragraph 7 of the Replying Affidavit.

In response to the said personal guarantee and paragraph 7 of the replying affidavit which introduced the said guarantee, the 1<sup>st</sup> Objector in the further affidavit stated thus:

*"2. THAT I have read and understood the*

*Plaintiff's Director's Replying Affidavit sworn on the 12<sup>th</sup> May 2008 and I swear this Affidavit in response thereto.*

*3. THAT I am a stranger to the contents of*

*paragraphs 3, 4, 5, 6, 7 and 8 of the said Replying Affidavit since I was not involved in that dispute."*

Mr. Kamotho submitted that the Objectors' contention is that they were not parties to the suit and that the Respondent had, through its agents, proclaimed the Objectors' goods, which it cannot do. Part of the complaint raised by the 2<sup>nd</sup> Objector in the Supporting Affidavit is the fact that the Chief Magistrate's Court was recorded as the court which issued the attachment, as the court where the matter was heard and that the 1<sup>st</sup> Objector was described as a debtor in the proclamation, "KKGI" annexed to the 2<sup>nd</sup> Objector's Supporting Affidavit. The 2<sup>nd</sup> Objector contends that she was not party to the suit and in any event the suit was heard in the High Court and in the circumstances the proclamation was misleading. The Objectors also annexed logbooks and other documents to their affidavits to demonstrate that various motor vehicles registered in the names of the Objectors and household goods belonging to the 2<sup>nd</sup> Objector were proclaimed. The 2<sup>nd</sup> Objector contended that she was not a director of the Defendant Company and was therefore a stranger to the proceedings.

Mr. Singh on his part submitted that once the 1<sup>st</sup> Objector signed the personal guarantee as surety to pay decree and the Defendant's debt, he became a party to the suit. Counsel relied on Section 92 of the Civil Procedure Act for this contention that once the 1<sup>st</sup> Objector became a surety, execution could be levied against him.

Order XXI rule 56 of the Civil Procedure Rules under which this application is brought provides as follows:

*"56. Should the attaching creditor, in pursuance of a notice issued under rule 54 intimate to the court and the objector that he proposes to proceed with the attachment, the objector shall take proceedings to establish his claim within 10 days of service upon him of such intimation."*

Rule 56 must be read in conjunction with rule 53(1) of the same order, which stipulates as follows; -

*"53(1). Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree-holder of his objection to the attachment of such property."*

These two rules set out quite clearly what an Objector in an application such as the instant one needs to show. The Objector must establish that he has a claim over the attached property by reason of being entitled to the property or by reason of a legal or an equitable interest to either the whole or part of the attached property.

There is no dispute that certain vehicles and house hold goods were attached in execution of the decree in this case. The only objection is a complaint by the Objectors that the proclamation gave a wrong description of the Defendant to the suit and of the court that issued the decree. I will deal with that at a later stage.

There is evidence to prove that the 1<sup>st</sup> Defendant executed a personal guarantee binding himself to ensure payment of cheques issued to the Decree-Holder/Respondent by the Defendant Company. It is not in dispute that the 1<sup>st</sup> Objector is the Managing Director of the Defendant Company. It is claimed by the 1<sup>st</sup> Objector that the personal guarantee he signed in this case was under duress. There is a laid down procedure through which the 1<sup>st</sup> Objector could have had the personal guarantee impeached. The filing of the objection proceedings was not that procedure. The personal guarantee has not been challenged as prescribed, is valid in law and is therefore binding on the 1<sup>st</sup> Objector.

Section 92 of the Civil Procedure Act stipulates:

“92 where any person has become liable as surety –

- (a) for the performance of any decree or any part thereof; or
- (b) for the restitution of any property taken in execution of a decree; or
- (c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon.

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall for the purposes of appeal be deemed a party within the meaning of section 34:

Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety.”

The 1<sup>st</sup> Objector became a surety to the Defendant's debts and was bound to the extent of the consent orders entered into by the parties and the guarantee he signed. The consent order at clause 2 and 3 thereof stipulated as follows:

“2. That the defendant will issue post-dated cheques for the above payments forthwith, which cheques Mr. Jagmohan Singh Ghataura, the Managing director of the defendant has undertaken that on consideration of the plaintiff agreeing to the payment in installments, he shall personally guarantee that the cheques shall be honoured on presentation.

3. That in default of my one installment, the plaintiff be at liberty to proceed with execution for the entire outstanding amount.”

The guarantee signed by the 1<sup>st</sup> Objector stipulates as follows in clause 1:

“I, JAGMOHAN SINGH GHATAURA, Post Office Box 18391 Nairobi (hereinafter called “The Guarantor”) GUARANTEE payment the Decree-holder of the said decretal amount outstanding in the above case together with interest and further costs with interest that may be due or become due hereinafter by installments of Kshs.1,000,000/- payable on or before 28<sup>th</sup> February, 2006, 30<sup>th</sup> April 2006 and on or before 30<sup>th</sup> June 2006 thereafter Kshs.381,212.85 plus accrued interest on decretal amount plus the Auctioneer's charge to be paid on or before 30<sup>th</sup> July 2006 until payment in full PROVIDED ALWAYS it is agreed and understood by me that in the event of the judgment debtor's refusal, failure or neglect to pay any of the installments on the strict due date hereinbefore set out, the whole balance then due herein shall become payable immediately by me as the Guarantor and by the judgment debtor as the principal debtor AND PROVIDED ALWAYS that the Decree-holder shall be at liberty to treat, consider and regard me as the principal debtor to all intents and purposes and to issue execution of the decree in this suit against the recovery of the amount then outstanding under section 92 of the Civil Procedure Act AND PROVIDED FURTHER that this Guarantee will continue to bind my estate in the event of my decease and empower the plaintiff to recover such amount as may be due in this suit from the personal representatives executors or administrators of my estate.

I FURTHER AGREE that any variation in terms agreed between the judgment debtor and Decree-holder or any release by the decree-holder of the judgment debtor or neglect forbearance or waiver on the part of the Decree-holder likely to impair my eventual remedy against the judgment debtor or otherwise shall not in any-wise release or discharge me or my estate in that behalf in respect of my liability arising under this Guarantee on my part hereinbefore contained. Any notice or demand hereunder shall be deemed to have been sufficiently given if sent to my postal address as hereinbefore mentioned or any other last known address which may have been notified to the Decree-holder” (Emphasis mine)

The personal guarantee that the 1<sup>st</sup> Objector signed bound him to personally pay the Defendant's debt once the Defendant failed to do so. The execution of the Decree herein against the 1<sup>st</sup> Objector cannot therefore be challenged. The 1<sup>st</sup> Objector became a party to the suit the moment the Defendant failed to satisfy the decree. He cannot be heard to say that he was a stranger to these proceedings.

I have perused the record herein vis-a-vis the submission by Counsel. It is quite clear that the Respondent has conceded that two motor vehicles proclaimed by the Galaxy Auctioneers on 9<sup>th</sup> May, 2007 belong to the 2<sup>nd</sup> Objector. In the 2<sup>nd</sup> Objector's further affidavit dated 14<sup>th</sup> May 2008, she annexed a copy of records for two motor vehicles registration No. KAB 742Z and KAC 663L as proof that both vehicles were registered in her name.

The 2<sup>nd</sup> Objector was not a party to the proceedings and had no relationship with the Defendant Company or the consent order entered into by the parties to this suit. The attachment of her property in satisfaction of the decree herein was an error. The two vehicles should be released to her forthwith.

The 2<sup>nd</sup> Objector has also annexed a Mortgage Agreement to show that she borrowed some money from the Standard Chartered Bank Africa PLC and secured same with a mortgage over the premises L.R. No. 209/407/4 Nairobi. The 2<sup>nd</sup> Objector in paragraph 5 of her affidavit deposes that the house and all household goods, furniture, fridges, cookers and all items in the said house without exception were bought by her over the years.

I note that Galaxy Auctioneers proclaimed household goods in what is described as Judgment's Debtor house No. 4 along Kileleshwa Lane. These are the items that the 2<sup>nd</sup> Objector lays claim to in these proceedings.

The issue is whether the 2<sup>nd</sup> Objector has established ownership, or alternative legal or equitable interest over the household goods. I must first comment that the proclamation generalized the goods proclaimed under the proclamation form. It is shown that "all house goods including furniture, fridges, cookers to be found in the Judgment's Debtor's house No. 4 along Kileleshwa Lane" and concludes by saying "to be itemized during removal". It does not give a proper description of the goods as required under the Auctioneers Act and Rules there under. Be that as it may, the 2<sup>nd</sup> Objector has shown that the house belongs to her. She also claims all goods in the house as hers.

I have considered the 2<sup>nd</sup> Objector's evidence regarding the household goods. She has shown that the house is registered in her name. She lays claim to all goods inside the house as goods she has bought over time. Considering that the 2<sup>nd</sup> Objector owns the house and lives in it as deposed in paragraph 3, 4 and 5 of her supporting affidavit, I am satisfied that the 2<sup>nd</sup> Objector has satisfactorily established ownership of the household goods. The attachment of her household property should not be allowed to take place, as the same is illegal.

In conclusion regarding this application, I do find that the error on the description of the parties and the court issuing the order was proof of carelessness on the auctioneer's part. It is the same carelessness exemplified by the pedestrian description of goods proclaimed as per the proclamation form dated 9<sup>th</sup> May, 2007. The misdescription of the parties and of the case was material and the same cannot be taken lightly. The entire proclamation exercise should be repeated in order to reflect the proper descriptions of the parties, case number and even the goods proclaimed.

Regarding the objection proceedings, I have already ruled that the proclamation of the 2<sup>nd</sup> Objector's vehicles Reg. No. KAB 742Z and KAC 663L, together with that of the household goods in her house along Kileleshwa Lane, was illegal. The proclamation is therefore set aside in totality.

Regarding proclamation of motor vehicle KAA 868Y, the same was proper save for the defective proclamation form. Since I have set aside the entire proclamation form, the Decree Holder can begin the process of execution of the decree against the 1<sup>st</sup> Objector afresh.

This application succeeds in part. The proper order to make regarding costs is that each party should bear its own costs.

Those are the orders of this court.

Dated at Nairobi this 13<sup>th</sup> day of June, 2008.

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered, in the presence of:**

Mr. Kamau holding brief for Mr. Kimotho Advocate for Applicant

Mr. Ochwo holding brief for Mr. James Singh Advocate for Respondent

**LESIT, J.**

**JUDGE**

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