



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

Divorce Cause 6 of 1997

MSK.....PETITIONER/DECREE HOLDER

VERSUS

SNK.....RESPONDENT/JUDGMENT DEBTOR

and

JCT LIMITED..... OBJECTOR/APPLICANT

RULING

By notice of motion dated 31.10.07 stated to be brought under section 3A of the Civil Procedure Act, Cap. 21 and Order XLI rule 4 (1) of the Civil Procedure Rules, the objector applied for the following orders:-

1. That the application be certified as urgent and be heard *ex-parte* in the first instance.
2. That there be a temporary stay of attachment and sale of the objector's goods pending the hearing and determination of this application.
3. That there be a stay of attachment and sale of the objector's goods pending the hearing and determination of the intended appeal.
4. That costs of the application be provided for.

The grounds upon which the application is based are:-

- i. That the objector's goods were proclaimed on 01.11.06 by Kenya Shield Auctioneers.
- ii. That the objector immediately lodged an objection and subsequently filed objection proceedings which were heard and determined by the court.
- iii. That the objection was dismissed on 11.10.07.
- iv. That the judgment debtor has made an attempt to settle the judgment debt by instalments but that proposal has been rejected by the decree-holder with a threat that the objector's goods will be attached and sold within one week of the 26.04.07 if full payment is not made.
- v. That the proclaimed goods belong to the objector.

The application was said by objector's/applicant's counsel to be supported by the affidavit of KSK, Managing Director of the objector company sworn on 31.10.07. The affidavit filed with the application on 31.10.07 is not dated. This fact was drawn to the objector's/applicant's counsel who said the only affidavit in the court file was inadvertently not dated. However, he showed the court his file copy which is dated 31.10.07 and he was allowed to replace the undated copy in the court file with the dated copy from his file. Objector's/applicant's counsel relied on the affidavit of KSK sworn on 31.10.07. He referred to Order XLI rule 4 (2) and submitted that if the attachment proceeds as proclaimed, the objector will suffer loss as the goods are not the judgment – debtor's but belong to the objector company. Objector's/applicant's counsel said that the application is timely in that Onyancha, J's ruling declaring the proclaimed goods to be the judgment – debtor's was delivered on 11.10.07, that notice of appeal against the ruling was filed on 17.10.07 and that the present

application was filed on 31.10.07. Applicant's counsel also pointed out that on 17.10.07 the judgment – debtor issued a cheque for Kshs.100,000/= to go towards off-settling the judgment debt of Kshs.901,950/= but that the plaintiff/decreed-holder rejected it on the basis that she required the full decretal sum.

On the basis of the foregoing, objector's/applicant's counsel urged this court to allow the application and grant stay of attachment and sale of the objector's goods.

For his part, counsel for the petitioner/decreed-holder opposed the application. The said counsel relied on the replying affidavit of MSK the petitioner/decreed-holder sworn on 05.12.07. Counsel pointed out that on 12.07.06 the judgment-debtor was ordered by the Court of Appeal to pay Kshs.901,950/= as maintenance arrears but declined, causing his goods to be proclaimed; and that the objector then moved to court and filed objection proceedings claiming the proclaimed goods to be his; that the objection was heard by the High Court (Onyancha, J) and dismissed on 11.10.07. Decreed-holder's counsel pointed out that the objector seeks appeal against Judge Onyancha's ruling pending the appeal. Decreed-holder's counsel submitted that the objector has to show sufficient cause in terms of Order XLI rule 4 (2) in order to obtain the stay sought. In the petitioner's decreed-holder's counsel's view, the objector has not shown why he has appealed against Onyancha, J's ruling as he has not annexed to his present application a memorandum of appeal. Decreed-holder's counsel pointed out that no appeal has been filed 7 months after Judge Onyancha's ruling and submitted that the present application is a delaying tactic. Decreed-holder's counsel pointed out that after the objector's objection proceedings were dismissed by Onyancha, J, the judgment – debtor forwarded a cheque of Kshs.100,000/= without any proposal on payment of the balance of Kshs.800,000/=, so the decreed-holder rejected the cheque and returned it.

Decreed-holder's counsel noted that Judge Onyancha ruled that the proclaimed goods belonged to the judgment debtor. The said counsel, therefore, submitted that the objector will suffer no loss even if the goods are sold. Counsel also noted that this matter has been pending for 3 years and urged this court to disallow the application.

In reply, objector's/applicant's counsel said that the objector's grounds of appeal are captured by paragraph 7 of the affidavit of K S K, Managing Director of the objector company sworn on 31.10.07. In objector's counsel's view, the said grounds show sufficient cause and cannot be dismissed as not being arguable. He said there is no requirement for the objector/applicant herein to annex a memorandum of appeal to his present application and that no memorandum of appeal has been filed as all the grounds of the intended appeal are incorporated in KSK affidavit. For the proposition that there is no requirement to annex memorandum of appeal, objector's/applicant's counsel said he relied on the proviso to rule 8 (1) (*sic*) of the Court of Appeal Rules made under the Appellate Jurisdiction Act, Cap.9. He said no appeal has been filed against Judge Onyancha's ruling because proceedings have not been supplied although they were applied for on 17.10.07 (they were actually applied for on 16.10.07), with copy to respondent's advocates.

Objector's/applicant's counsel acknowledged that Judge Onyancha found the goods to belong to the judgment debtor and that the intended appeal will seek to challenge that finding. He submitted that if the goods are sold while they belong to the objector, that will occasion substantial loss to the objector. Counsel reiterated that the application be allowed.

I have given due consideration to the application, the opposition thereto and the rival arguments of the parties.

The central legal provision under which the present application was brought is Order XLI rule 4(1), which provides:

'4. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellent court to have such order set aside.'

Objector's/applicant's counsel also told this court that he acknowledged that the applicant was under rule 4(2) of the same Order supposed to demonstrate substantial loss to himself if the stay sought was not granted. The said sub-rule (2) is in the following terms:-

'(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'

When the goods in question were proclaimed for attachment and sale to satisfy the respondent's/judgment-debtor's debt of Kshs.901,950/=, the objector company filed objection proceedings in the High Court claiming that the goods belonged to it and not to the respondent/judgment-debtor. The objection proceedings were heard by Onyancha, J who in a ruling delivered on 11.10.07 declared the goods to belong to the judgment-debtor and dismissed the objector company's objection proceedings. It is now on record that on 16.10.07 the objector drew up a Notice of Appeal and filed it on 17.10.07 in the High Court. On the same 16.10.07 the objector also applied for typed copies of the objection proceedings before Onyancha, J, and for a typed copy of the Judge's ruling of 11.10.07 for purposes of the intended appeal. The application for the proceedings and ruling were also filed in the High Court on 17.10.07. On 31.10.07 the objector company filed the notice of motion application, of the same date, now under consideration.

Objector's/applicant's counsel informed this court at the hearing of the present application that no appeal had been filed because the proceedings had not yet been supplied. Responding to respondent's/judgment-debtor's criticism that no memorandum of the intended appeal

had been filed, objector's/applicant's counsel submitted that no memorandum of appeal had been filed because there is no requirement for such memorandum and also because all grounds of the intended appeal are incorporated in KS K's affidavit sworn on 31.10.07. For the proposition that there is no requirement to annex a memorandum of appeal to the present application, objector's/applicant's counsel said he relied on the proviso to rule 8(1) of the Court of Appeal Rules made under the Appellate Jurisdiction Act, Cap 9. There is actually no proviso to rule 8(1). The marginal note to rule 8 is 'Maintenance of registers' and it does not specifically address the question whether there is or there is no requirement to attach to an application as the one now before court a memorandum of appeal. All rule 8(1) is concerned with is that the Registrar or Deputy Registrar should ensure that registries or sub-registries have registers in which there must be entered particulars of every application lodged in registries or sub-registries relating to appeals. I do not see the relevance of rule 8(1) on the issue of requirement or non-requirement for attaching a memorandum of appeal to the application at hand.

According to the affidavit of KSK, the objector's/applicant's grounds of appeal appear to be:-

(a) That the proclaimed goods were purchased by the objector company which kept them in the judgment-debtor's house leased by the objector company for the judgment-debtor as its chairman.

(b) That Judge Onyancha's decision to lift the veil of incorporation of the objector company was legally wrong.

(c) That the intended appeal against Judge Onyancha's ruling has high prospects of success.

I am not sitting on appeal over my brother Judge's ruling. That is the function of the Court of Appeal.

For purposes of the present application, I note from the replying affidavit of the petitioner/decree holder, MSK sworn on 05.10.07, after the objector's objection proceedings were dismissed on 11.10.07, that the judgment-debtor issued a cheque for Kshs.100,000/= which the judgment-debtor described as "first monthly instalment towards off-setting the remainder of the maintenance sum." The cheque was forwarded to the petitioner/decree-holder under cover of a letter marked 'WITHOUT PREJUDICE'. It is, however, noteworthy that the forwarding letter said nothing about how the balance of the maintenance sum was going to be liquidated. It is to be recalled here that the petitioner's/decree-holder's counsel informed this court, at the hearing of the present application, without demur that on 12.07.06 the judgment-debtor had been ordered by the Court of Appeal to pay Kshs.901,950/= as maintenance arrears but he declined, thereby provoking the proclamation of the goods in question. The issue which is on its way to the Court of Appeal is not the respondent's/judgment-debtor's indebtedness to the tune of Kshs.901,950/= in respect of maintenance arrears but whether the goods proclaimed to secure payment of that debt belong to the respondent/judgment-debtor or to the objector/applicant.

It is not my concern whether the intended appeal against Judge Onyancha's ruling of 11.10.07 will succeed or fail. My concern is that the petitioner's/decree-holder's interests should, first and foremost, be protected as the top priority. The respondent/judgment-debtor was found by a competent court to own the proclaimed goods. That finding remains intact and undisturbed at the moment. The objector company/applicant claims that the proclaimed goods belong to it and prays vide prayer 3 that the said goods should not be attached and sold pending the hearing and determination of the intended appeal. I shall grant prayer 3 upon each of the objector/applicant and the respondent/judgment-debtor providing requisite security to safeguard the petitioner's/decree-holder's interests. Accordingly, I make the following orders:-

1. Prayer 3 in the notice of motion dated 31.10.07 is hereby granted SUBJECT TO:-

(a) The respondent/judgment-debtor depositing within 10 days Kshs.901,950/= in an interest earning account in the joint names of the advocates for the petitioner/decree-holder and of the advocates for the respondent/judgment-debtor.

(b) The objector/applicant depositing within 10 days Kshs.901,950/= in an interest earning account in the joint names of the advocates for the petitioner/decree-holder and of the advocates for the objector/applicant.

2. If the objector's/applicant's intended appeal:-

(a) Succeeds, the goods shall be restored to the objector/applicant and the objector's/applicant's deposit plus interest shall be refunded to the said objector/applicant whereupon the respondent's/judgment-debtor's deposit plus interest shall be forfeited to the petitioner/decree-holder.

(b) Fails, the respondent/judgment-debtor shall forfeit his deposit plus interest to the petitioner/decree-holder and the goods shall be restored to the respondent/judgment-debtor whereupon the objector's/applicant's deposits plus interest shall be refunded to the said objector/applicant.

3. Costs in the cause.

Orders accordingly.

Delivered at Nairobi this 28th day of July 2008.

B.P. KUBO

JUDGE