REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 1914 OF 2000

DR. MICHAEL KWENA……………..……….PLAINTIFF/JUDGEMENT DEBTOR

- VERSUS –

RAZA PROPERTIES LIMITED…………..…...1ST DEFENDANT/RESPONDENT

PARK VIEW AUCTIONEERS……………......2ND DEFENDANT/RESPONDENT

AND

GRACE WANGARI KWENA………..……………...…OBJECTOR/APPLICANT

JUDGEMENT

The plaintiff herein Dr. Michael Kwena filed this suit against Raza Properties Limited and Park View Auctioneers as defendants. The salient features relevant to this ruling are that:-

(i). The plaintiff was at the material time relevant to the suit a tenant of the defendant on the 5th floor of the defendants Impala House, Tom Mboya Street, Nairobi under a lease for 5 years 11 months effective October 1998.

(ii). On or about 10th November 2000, the second defendant purportedly acting on instructions of the first defendant unlawfully, illegally and wrongfully proclaimed on the plaintiffs goods.

(iii). Contended that the said purported distress for rent is wrongful, irregular, unjustifiable, oppressive, unconsiable and illegal for the reason that on the said date there was no rent arrears due to the defendant, the lease agreement excludes distress for rent, the 1st defendant has a has refused to acknowledge money paid by the plaintiff as rent, the 2nd defendant has no valid auctioneers licence, the distress is also unlawful as the proclaimed goods are tools of trade.

In consequence thereof the plaintiff sought a declaration that the defendants levy of distress against the plaintiff is illegal.

b. An injunction to restrain the defendant, their servants or agents from proceeding with the distress for rent

c. Costs of the suit.

The suit was accompanied by an interim chamber summons dated 21.11.2000 and filed the same date brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act and all enabling provisions of the law. The key prayers in it was prayer 2 seeking an order restraining their servants and or agents from proceeding with the distress for rent upon the plaintiffs premises in the 5th floor of Impala House, Tom Mboya Street, Nairobi pending the hearing and final determination of this case and that of costs be provided for.

A perusal of the court record reveals that interim orders were extended on 5.1.2.2000 until further orders. Along the lines the defendant put in an amended statement of defence and counter claim amended on 4th July 2002 and filed on 25th July 2002. The salient features to the ruling are as follows:-

(a) That indeed there existed a lease agreement between the plaintiff and the defendant for a period of 5 years and 6 months effective from 1st November 1998 whose rent is payable quarterly at the rate of Kshs.35,000.00 upto October 2000 and Kshs.42,000 from 1st November 2000, rent of Kshs.151,2000.00 is to held by the land lord as deposit until termination of the lease and refundable upon production of final accounts by the tenant.

(b) Asserted that the distress was proper as there was rent arrears from September 2000 upto January 2001 to the total tune of Kshs.276,000.00.

(c) In the counter claim avered that the plaintiffs secretly vacated the premises in the month of October 2001 with rent outstanding from January 2001 to October 2001 to the tune of Kshs.654,000.00, costs of the suit and interest.

A further perusal of the record, reveals that the plaintiff failed to file a reply to amended defence and defence to counter claim and the defendant applied for interlocutory judgment which was entered by the Principal Deputy Registrar on 27th day of November 2002.

A bill of costs was filed by the defendants, taxed exparte on 13.02.2006 and a ruling to the same delivered on 24.03.2006 allowing the bill at Kshs.62,009.00. On 24.04.2006 an attachment order was issued.

On 28th April 2006 a notice of objection to the attachment was made and filed under Order XXI Rules 53 of the Civil Rules. It was made by Grace Wangari Kwena. By it, the objector objects to the attachment and proposed sale of the objectors Motor vehicle registration number KAN 169 N make Toyota 1.5. KE Saloon.

(b) The objectors assorted house hold goods which had been attached on 25.04.2006 at the objectors rental residential premises at house, No. B12 Wambugu Gardens, Wambugu Road Parkroad, Nairobi by Dollar Auction, against the defendant/judgment debtor herein.

The grounds for the objection are set out in the body of the objection, supporting affidavit, annextures, grounds in the written skeleton arguments filed herein. The major ones are that:-

(1) The objector is an estranged wife of the judgment debtor herein with the separation having taken place in early 2003. Since then the judgement debtor has lived in various places namely Garissa Scandinavia, Uganda and the Democratic Republic of Congo.

(2) That the objector was left to take care of 3 children of the marriage with whom she resides in house no. B 12 Wambugu Gardens Wambugu Road Parklands, Nairobi under a separate tenancy agreement in her name. She is employed as a nurse by the Kenya Government and so she is financially independent from the estranged husband.

(3) That she solely purchased the household goods as per the receipts shown and exhibited herein.

(4) That as for the vehicle attached, the same was retained by her under the separation agreement and as at the time of the attachment she was in the process of processing the transfer into her name.

(5) It is agreed that the estranged husband used to live in this same house before the estrangement.

(6) By reason of the above the court is urged to lift the attachment.

Upon the filing of the objection, the Deputy Registrar issued the usual statutory notice to the judgment debtor, to intimate whether he wishes to proceed with the attachment and execution as well as staying the process. This notice was issued on 25th April 2006. Whereas the notice of the intention to proceed with execution under Order XXI Rule 56 was issued on 2nd May 2006 to the judgment debtor, and 5th May 2006 to the Deputy Registrar, where upon the objector presented an application by way of chamber summons presented under Order 21 Rules 56 and 57 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. The orders sought are:-

(1) That the proclamation/attachment of the motor vehicle Reg. No. KAN 169 N make Toyota 1.5. KE Saloon and the assorted household, goods by Dollar Auction on 25.04.2006 in purported execution of the decree herein be lifted and the said motor vehicle and assorted household goods be released from attachment forthwith.

(2) That the costs of this application be borne by the defendant/decree holder.

The application is dated 12th May 2006 and filed on 15th May 2006. The grounds in support are the same as those which the objection is anchored already set out herein above. The annextures annexed to the affidavit in support are the same in so far as annexture GWK 1, 2 and 3 are concerned. There is an additional annexture GWK 4 which is a copy of a log book for motor vehicle Reg. No. KAN 169 N. A perusal of the change of ownership stamps reveals that ownership to the first owner, Joel Micah Njenga was effected on 22.9.2001 to Michel K. Igala on 12.007.2005 and to the objector on 28.4.2006.

The respondent has opposed the application on the basis of a replying affidavit by one Ochieng Ouma a process server sworn on the 21st day of July 2006 and filed on a date not visible and a supporting affidavit by one Ramzan Nanji a Director of the 1st defendant sworn on 21st July 2006 and filed the same date. The salient features of the affidavit of John Ochieng Ouma are as follows:-

(i). That he received instructions from counsel for the defendant in April 2006 to trace the residence and assets of the plaintiff herein for purposes of attachment in execution of the decree and certificate of costs.

(ii). That he traced the plaintiff/judgment debtors premises through Kenya Power and Lighting Company Ltd. and called at the premises in the same month of April 2006. Upon arrival on a date not disclosed, he had occasion to talk to the security man and the house help who confirmed the plaintiff resides there with the wife and child. He went back again on a Saturday and met the objector who declined to talk to him. The deponent goes further to say that he led Dollar Auctions to the premises to effect the attachment. A search was carried out at the Registrar of motor vehicles and it was confirmed by annexture JOO – 1 (a – d) from the Registrar of motor vehicles to the effect that as at 25.4.2006, the owner of motor vehicle registration number KAN 169 N was Michael Kwena the plaintiff.

(iii). That the electricity bill annexture JOO – 1 (d) confirms that the house is still in the name of the plaintiff and therefore it is not true that the objector moved in to the said premises in 2003.

The salient features of the affidavit of Ramzan Nanji are that:-

(i). Since the electricity bill annexed to the replying affidavit confirms that the plaintiff still resides at the same premises, this goes to oust the objectors assertion that the couple is separated as there is no way

a separated couple can reside in the same house.

(ii). Further that there is nothing to show that the receipts prove that the attached goods belong to the objector and not the plaintiff.

In their written skeleton arguments counsel for the respondent reiterated the contents of the two affidavits and stressed the following points:-

(a) That the replying affidavit of John Ochieng Ouma as well as the annextures confirms that the plaintiff resides at the same premises as the objector which ousts the objectors assertion that she moved to the premises after separation with the plaintiff.

(b) Lack of separation is further proved by the fact that the electricity bill annexed by John Ouma and the lease agreement annexed by the objector share the same address.

(c) In the absence of early leases in favour of the objector for the years 2003, 2004, 2005, the lease agreement relied upon as annexture GWKI, in their opinion is conveniently dated 1st March 2006 two months before the attachment. It is also suspect in that it is not signed by the objector or the tenant.

(d) The receipts relied upon by the objector as proof of ownership of the attached goods do not bear her name and so there is nothing to show that the said attached goods belong to her and not to the judgement debtor.

(e) As regards the vehicle, the registration of the same in the name of the objector 3 days after attachment is suspect and it is their stand that it is nothing but a fraudulent move by the objector to defeat the cause of justice by defeating the attachment which move this court is urged not to uphold but to set aside. What this court should bear in mind is that as at the date of the attachment on 25.4.2006 the judgement debtor was the owner of the said vehicle.

(f) By reason of what has been stated above, the court, is urged to hold that the objector has failed to prove her rightful claim to the attached goods, dismiss the objection and then allow the halted attachment to proceed to its logical conclusion.

The respondent referred the court to case law. The case of **SERINGA JILL BIRGIT GOTKE VERSUS SETTLEMENT FUND TRUSTEES [1966] EA 462**. The brief facts relevant to this ruling are that the defendant had filed suit which was still pending against G. the husband of the objector for Kshs.90,520/= for a partial failure of consideration on a contract of sale of cattle. On the same day they made an application under Order 38 Rule 5 of the Civil Procedure Rules for attachment before judgment of an aircraft alleged to belong to G. but claimed by the objector as her own property. The objector as a plaintiff took out an OS under Order 21 Rule 58 objecting to the attachment. G. left Kenya on 16th August 1965 after gratuitously transferring the aircraft to the plaintiff with effect from August 14th 1965. Also on August 16th 1965, the plaintiff informed the Director of civil aviation that she had authorized C to dispose of the aircraft on her behalf.

It was submitted on behalf of the defendants that a reasonable inference to be drawn from the transfer of the aircraft was to put available asset out of reach of the defendants, that the transfer was a mere sham which was in effective to pass any property and that even if the transaction were valid, it was one which the court should set aside. In opposition it was argued that the transfer remained valid until set aside which could not be set aside in these proceedings.

It was held inter alia that:-

"**(1)** The purpose of the transfer of the aircraft was to put available asset out of the reach of the defendants should they succeed in their claim against G.

(2) The plaintiff had legal or equitable title to the aircraft and the defendants were entitled to proceed with the application for attachment before judgment.

There is also the case of **HARILAL & CO. VERSUS BUGANDA INDUSTRIES LTD. [1960] EA 368**. Herein, on February 16.1960 the plaintiff applied for execution by way of attachment and sale of property of the defendants and on February 18.1960 a warrant of attachment and sale was issued. That the property was seized was not in dispute but the objector claimed part of the property on the ground that he had bought the same on January15.1960 and applied to the court, for its release from attachment under Order 19 Rule 53 of the Civil Procedure Rules. The objector admitted that he took neither actual nor constructive possession of the property after the alleged sale. At paragraph G. page 319 Lewis J. as he then was, made the following observation:-

"*I am also satisfied that the agreement exhibit A was entered into for the express purpose of saving the defendants movable property from execution.*

The result is that the claimant having failed to establish that on the date of the attachment he was in possession either actual or constructive the application is dismissed with costs."

On the strength of that reasoning the court held that:- "*the objector had failed to establish that on the date of the attachment, he was in possession actual or constructive of the property attached*."

The case of **GEORGE GIKUBU MBUTHIA VERSUS PETER NJERU MUGO, GEOFFREY KARIUKI MWANDA, ATTORNEY GENERAL AND CONSOLIDATED BANK OF KENYA LTD., NAIROBI MILIMANI COMMERCIAL COURT CASE NO. 1260 OF 2002**, which dealt with objection proceedings whose central theme was that individual debts of directors cannot be visited upon the company.

Kasango J. made observations on the facts of the case at page 3 of the ruing line 6 from the bottom thus:- "*The 2nd defendant carried out a search of the motor vehicle of the particulars of ownership as at 23rd November 2004, which search revealed that the vehicle by then was registered in the name of Shabbir Brothers. Counsel drew the courts attention to the log book which he said clearly showed that there were changes in ownership both on the same day, that is 24th November 2004 firstly to Mohamed AFZA and secondly to Palace Investments Ltd. He said the acquisition of the motor vehicle by the objector did not show for what consideration the same was acquired. The second defendant also carried out a search of the Company Palace investment Ltd. and it revealed that as at 26th January, the deponent of the affidavit in support of the objectors proceedings was not a director of Palace Investments Ltd. To this counsel suggested that the only inference was that the letter indication that the said Pauline Wanjiru Njuguna was a director was manufactured to counter the 2nd defendants arguments*."

Going backwards at page 2 line 1 from the bottom the learned Judge had observed thus:- "*counsel argued that the mere fact that the deponent failed to state that she had been authorized by the objector company to swear the affidavit invalidated the affidavit. . . . that even if the court, finds that the affidavit is properly on record, the evidence it avers to do not support the objector. . . . He pointed out that the auctioneer first saw the plaintiff drive the subject motor vehicle on 16th December 2004 (proclamation was dated 23rd November 2004) . . . and it was not until 22nd December 2004, that he succeeded*."

At page 5 of the ruling the learned Judge quoted with approval rule 14 of the Auctioneers Rules 1997 as follows:- "*no person shall remove, alter, damage, substitute or alienate any goods comprised in the proclamation until they are reclaimed by payment in full of the amount in the court, warrant or letter of instruction or such lesser amount as the creditor or his advocate shall agree in wr*iting. *It is clear from this rule that attachment is complete on proclamation. It follows that I find that attachment of motor vehicle KVE 001 was completed on 23rd November 2004 since it is a moveable item*."

There is also the case of **KENYA OIL COMPANY LTD. VERSUS FUAD MAHMOUD MOHAMED AND FUEL MOGULLS' SERVICES LTD. AND ABDUL REHMAN ABDALLA**

SALEEM AND MARIVAN RASHID AND MARIAM FUAD MAHMOUD as 1st, 2nd and 3rd objectors. It was decided by Ringera J. on 16th day of December 2003. The reasons for objection start at page 2 line 3 from the bottom. The first objector claimed that he was a tenant and some of the goods proclaimed on 31.10.2003 by the court, broker namely the generator, the supermarket, stock, desks, chairs, disco systems and all kitchen utensils belong to him as a tenant.

In support of the claim the 1st objector annexed an undated lease agreement executed on 15.10.2002 whereby he took tenancy of the business comprising a restaurant and discotheque situated on plot Kwale/TIWI/2394 for a term of 5 years and 1 month with effect from 1.10.2002.

The second objector on the other hand stated that Motor vehicle KAJ 285 M is his property jointly with one Hemed Rashid. He has annexed a copy of log book to his affidavit in support of that claim. The log book shows that the vehicle was transferred from the 1st defendant, judgement debtor to him on 31.7.2003.

The 3rd objectors case was that the attached household goods namely T.V. set, music system and two speakers, sofa sets, dining table and chairs, fridge cooker and gas cylinder belong to her. She annexed receipts for the purchase. The 3rd objector went further to invoked her religion and claimed that in a Muslim homestead all household goods belong to the wife due to the polygamous nature of the Islamic marriages. It is on record that it was conceded by the objectors counsel that the 3rd objector is one of the wives of the 1st defendant /judgement debtor.

It is on record that opposition to the objection proceedings was to the effect that an entity called Fal Enterprises had earlier on objected to the attachment of goods now claimed by the first objector. The same goods were the subject of the second notice of objection filed on 29.9.2003 by the first objector and Southern Credit Banking Corporation which was abandoned.

As for the second objection, it was argued that since the attachment was effected while the motor vehicle was in the hands of the 1st defendant/judgement debtor whom the log book shows was the first owner, the court, was called upon to disregard the subsequent transfer and not to allow it prevent the execution.

As for the 3rd objector it was argued that she had not shown that she had any income which would have enabled her to acquire the properties and secondly there was nothing that could be used to verify the genuineness of the receipts and further the invocation of the Islamic religion to support her claims was proof that the household goods were not hers hence her claim was not genuine.

At page 7 of the ruling line 7 from the top, the learned Judge, as he then was reiterated that the burden of proof is on the objector to establish a legal or equitable interest in the property subject to the execution on a balance of probability.

After due consideration the learned Judge went on to make the following findings in respect of each objection:-

(1) *The fact that the first objector is a tenant of the restaurant and discotheque does not in any way established that the goods attached there from belong to him. More over the goods are not mentioned in the lease agreement as belonging to the tenant. Neither had the tenant produced any document to prove that they belong to him. The doubt was further added weight by the fact that the same goods had been claimed to be owned by Fal Entertainment Ltd. but the 1st objector had not mentioned any connection that he may have with the said entity*. On that account the learned Judge disallowed the first objectors objection.

As for the second objector the learned Judge as he then was ruled that "*the log book of motor vehicle KAJ 285 M showed prima facie that he was deemed to be the legal owner and the decree-holder*

judgement creditor had to prove otherwise which had not been done". Further that "*it mattered not that the first judgment debtor had been the first owner and it was attached while being driven by him. Further that it had not been the subject of attachment in March 20002 and as such nothing prevented the first judgment debtor from transferring it to another 3rd party. There was nothing to show that the transfer was a match on the execution process*". The learned Judge as he then was went on to hold that "*even if the transfer was a match against the execution, until such a transfer was set aside, the transferee remained the prima facie owner of the vehicle*". Accordingly objection by the second objector was upheld.

As for the 3rd objectors objection the learned Judge as he then was made findings to the effect that "*there was nothing to challenge her ownership of the household goods. That one need not proved that one is salaried or otherwise endowed with income to acquire household goods unless there was some evidence to suggest that the purported purchases were not made by her. That similarly it was not usual to call on the evidence of sellers of goods in objection proceedings to verify alleged purchases from them. Further that only if the decree-holder had managed by some credible evidence to shift the evidential burden on the 3rd objector that she would have been constrained in the discharge of her legal burden to call evidence of both her ability to purchase the said goods and possibly the shopkeepers evidence of the purchases in question. That there was nothing in the decree-holders affidavit which would have had the effect of shifting the evidential burden to the objector*". On that account the court upheld the 3rd objectors' objection.

This court, has taken due consideration of the rival arguments herein and considered them in the light of case law cited above and in this courts opinion the following questions have arisen for determination by this court, namely:-

(1) Whether there is a valid judgment and decree on record, on the basis of which execution process can be anchored.

(2) Whether there is a valid attachment order on record.

(3) If the attachment is valid, what is the effect of the said attachment on the attached goods.

(4) Whether the objector is entitled to object to the attachment.

(5) Whether the opposition affidavits are competent.

(6) Whether the objection is to be upheld.

(7) What are the final orders herein.

As regards existence of a valid judgment and decree herein, the court, is satisfied that as noted earlier on in this ruling, there is no dispute that the plaintiff judgment debtor defaulted on putting in a reply to defence and defence to counter claim, thus inviting application and entry of judgment on 27th day of November 2002. Since then the said judgment still stands. A decree in pursuance of the same was issued by the court on 18th day of April 2005. The same was sealed and issued by the court on 11th day of May 2005. There is a certificate of taxation issued on 6th day of April 2006. In the premises the court is satisfied that there is a valid decree on which an execution process can be anchored.

As regards whether there is a valid attachment order on the record, there is an application for execution filed in court on 20th April 2006. There is traced on record a warrant for sale of property in execution of decree for money addressed or directed to Dollar Auctioneers, Nairobi dated 24th day of April 2006. The proclamation attached to the objections as annexture GWK 3 dated 05.04.2006 shows on the face of it that it emanates from Dollar Auctioneers and that the proclamation was done on 25.04.2006. The court, is therefore satisfied that there is a valid attachment on the record fortified by the fact that the objector has not in any way attached the attachment or in any way sought to fault the same

save for her allegations that the goods attached belong to her.

Having ruled that the attachment was proper then it follows that it automatically becomes a protected attachment in line with the provisions set out in Rule 14 of the Auctioneers Rules 1997 set out by Kasango J. at page 5 of her ruling delivered on 20th day of April 2005, in the case of **GEORGE GIKUBU MBUTHIA VERSUS PETER NJERU MUGO AND 3 OTHERS (SUPRA)** thus:- "*no person shall remove, alter, damage substitute or alienate any goods comprise in the proclamation until they are redeemed by payment in full of the amount in the court, warrant or letter of instruction or such lesser amount in the court, warrant or letter of instructions or such lesser amount as the creditor or his advocate shall agree in writing*." It follows that if anything was done to the attached goods contrary to the above rule invites sanctions from the court, seized of the matter subject to proof of course.

The right to objection to attachment is conferred by the provisions under which the objection notice was filed and the application for lifting of the attachment presented namely Order 21 Rules 56 and 57 of the Civil Procedure Rules though wrongly described in the application for lifting to read Order 56 and 57. There is no Order 56 and 57 in the Civil Procedure Rules. There is therefore a misdescription of the headings of the application for the lifting of the attachment which does not go to the root o f the application to fault it as the defect is curable under Order 50 Rule 12 Civil Procedure Rules which read:- "*every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule*." This being the case it means despite the defect the application has to be disposed off on merit.

As stated, the objection has been made under Order 21 Rules 56, 57 Civil Procedure Rules which reads:-

"53 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.

(2) Such notice shall contain the objectors address, for service and shall set out shortly the nature of the claim which such objector or person makes to the whole or portion of the properly attached." The objector therefore exercised her right under this rule. The other rules namely 56 and 57 are merely procedural in that Rule 56 entitles the judgment creditor upon receipt of the notice of objection to intimate to the court, whether he/she intends to proceed with the attachment which the judgment creditor, herein complied with whereas rule 57 provides the mode of presentation of the application for lifting of the attachment, which is by way of presentation of chamber summons which has been done save for the mis description of the heading which is curable as stated. The procedure has therefore been complied with.

As regards the competence of opposition, the opposition is based on the replying affidavit by one John Ochieng Ouma who has described himself as a court process server and investigator. He has deponed in paragraph 1 o f the said affidavit that he has authority to depone from the respondent. This authority to depone has not been annexed. This would be in direct contravention of the provision of Order 1 Rule 12 (2) which provides:- "*The authority shall be in writing signed by the party giving it and shall be filed in the case*". Had the deponent been an investigator, only lack of annexing of the authority to depone from the defendant would have faulted the deponement. However, since he doubles up as a process server as well, the authority to depone is assumed and in normal court procedures, that this court, has judicial notice of the authority to depone is never annexed to the process server's affidavits. None has therefore required to be annexed by the process server herein. The process server's affidavit is therefore properly on record.

There is a supporting affidavit sworn by one Ramzan Nanji on 21/7/2006 and filed the same date. He depones in paragraphs 1 that he is a Director of the first defendants company and he is duly authorized by the first defendant to swear the affidavit. The authority to so depone has not been annexed. The first defendant being a body corporate, this court, has judicial notice that it would normally transact business

of giving the authority, either through the share holders meeting, or the board of directors meting. In the absence of minutes for the meeting during which the authority was given, as well as the authority given, is fatal to the supporting affidavit. There is no alternative but to strike out. In the premises the court, makes a finding that it is only the affidavit of the process server which form the basis of lawful opposition to the objection proceedings herein. See the case of **WAITHAKA VERSUS INDUSTRIAL COMMERCIAL DEVELOPMENT CORPORATION (2001) KLR 374** where it was held inter alia that:- "*an affidavit sworn on behalf of a corporation must identify the capacity of the defendant. Without identifying the deponement, it is impossible for the court to accept that any matter deponed to is within the deponements knowledge*". And the case of **RESEARCH INTERNATIONAL EAST AFRICA LTD. VERSUS JULIUS ARISI AND 213 OTHERS NAIROBI CA 321** decided on 27th April 2007 where the court of appeal reiterated that:- "*the authority to act if given has to be in writing and filed in court*".

Having established that valid opposition exists the court, proceeds to examine the merit of the objection. The core of the objectors stand is that she is an estranged wife of the judgment debtor. They separated in 2003 which situation forced her to lease the premises where the attachment was effected. That the attached motor vehicle was given to her as her share of the family property under the separation deed. Whereas the household goods were purchased by her since she is working as a nurse, she has income of her own and therefore has ability to acquire the properties. She has annexed copies of receipts of the purchased households as proof.

The judgment creditors opposition to it (objection) is based on the assertion that:-

§ The alleged lease is not signed by the objector.

§ The premises had been previously under the lease of the judgment debtor who had been served at the said premises previously.

§ The electricity bills disprove the objectors allegation of tenancy of the said premises as they still come in the name of the judgment debtor.

§ Ownership of the motor vehicle cannot stand as transfer was effected on 28.4.2006 where as the same motor vehicle had been attached on 25.4.2006.

§ There is nothing to show that it is the objector who purchased the said household goods and not the judgment debtor.

§ In all the circumstances of the case the objection proceedings have just been fronted for purposes of derailing the execution process herein and they should be disallowed.

Due consideration has been given to the above rival arguments and the same have been considered in line with the case law relied upon herein and the court proceeds to make the following findings:-

(1) Starting with households, there are receipts annexed. Indeed they do not bear the name as to who purchased them. It is however to be noted that the objector has deponed that she is a nurse, a fact confirmed by the process server who deponed that she is a nurse at Mathare Mental Hospital. As observed by Ringera J. as he then was in the **KENYA OIL COMPANY LTD CASE (SUPRA)**. "*Once the objector demonstrates ability to acquire households goods, the burden shifts to the judgment creditor to demonstrate otherwise*". In a situation of man and wife, a situation that this court, has judicial notice of as a result of the discharge of duties in relation to disputes relating to man and wife properly rights, the right to contribution to acquisition either directly or indirectly is almost unquestionable. Household goods are meant to be for the use of the entire family. It is therefore difficult to put a clear distincting line as between what belongs to the husband as opposed to what belongs to the wife. The assumption usually is that there is common usage for all the family of all the households, thus making difficult to make a clear and precise decision as to what belongs to the wife as opposed to the husband.

As observed by Ringera Judge, as he then was, the person who could be called upon to shed some light on the ownership, are the shop keepers from whom the goods were purchased. But as observed, it is not a normal practice for courts to call shop keepers to prove such purchases. The decision of who owns the households will therefore depend on whether the objector has demonstrated ability to acquire. In this courts' opinion, the objector herein has demonstrated such an ability by virtue of her being in gainful employment and by her being a family member. The objection against the attachment of the household goods is therefore upheld.

As regards the motor vehicle, there is no dispute that the judgement debtor was an owner. The copy of the log book shows he was registered as such on 2.7.2005. That ownership passed on to the objector on 28/4/2006 by which time the vehicle had been attached on 24.4,2006. The decree holder has urged the court not to uphold the said transfer as the same was likely to have been effected with a view to defeating the execution. The objectors counsel countered this by submitting that application for transfer had been presented earlier. Neither party has availed the application form for transfer to show when the same was presented, in order to determine whether it was within the bracket from the date the investigator visited the premises to the date of attachment.

This court has on the hand decisions on the matter. There is the case **SERINGA JILL BRIGIT GOTKE VERSUS SETTLEMENT FUND TRUSTEES (SUPRA)** where the owner of the aircraft transferred the aircraft free of charge to the wife on 14.8.65 and then left the country on 16/8/65. The suit was filed on 28/8/65 simultaneously with an application for attachment before judgement which order was issued on 30/8/65. Objection to attachments was commenced and upon hearing of the same, the court, ruled inter alia that the purpose for the transfer of the aircraft was to put available asset out of the reach of the defendant should they succeed in their claim against G.

The above decision was based on the grounds that on the basis of the evidence before the court, G. was aware of the impending proceedings against him and it was believed that that is why he transferred the valuable asset to his wife. On that account the court, upheld the attachment. It is on record from the facts that parties agreed to dispose off subject aircraft and proceeds deposited in court, to await the determination of the suit.

In the case of **GEROGE KIKUBU MBUTHIA (SUPRA)** Kasango J. refused to uphold a transfer of attached property because the attachment was completed on 23rd November 2004 whereas the changes were effected on 24th November 2004.

In **KENYA OIL COMPANY CASE (SUPRA)** Ringera J. as he then was upheld objection because there was no evidence that the transfer was effected in a manner calculated to steal a match on the execution. The learned Judge as he then was, went on to rule that even if it had been proved that this was the position , there was no way the objection could not have been upheld in the absence of an order setting aside the transfer.

All these three decision are high court decisions and therefore not binding on this court. There are however central themes in then that this court, cannot igonre namely:-

(a) There has to be proof that the transfer was calculated to defeat the execution.

(b) There should be an order upsetting the transfer.

Applying that to the fact herein, the court makes a finding that the application for transfer document was a crucial document herein. It would have shown whether the transfer was applied for after the attachment in which case the transfer would have been tainted and would have been upset upon an appropriate order being applied for.

(c) Where a transfer to the objector is completed and has not been upset, it is as good as any other and should be protected.

Of the two decisions, this court chooses not to be persuaded by the stand of Kasango J. because after faulting the objection and dismissing the same, the learned Judge did not go further to make a pronouncement on the title of the vehicle i.e. that the transfer stood nullified for whatever reason. As such the decision was not conclusive. It was left open for the decree holder to apply through other proceeding to have the transfer nullified or set aside.

The court, chooses to be persuaded by the decision of Ringera J. as he then was because it is conclusive in that it stated clearly that a transfer evidenced by a log book can only be upset upon being set aside. Herein the transfer subject of these proceedings has not been upset and therefore it has to be upheld.

For the reasons given above the court, is inclined to uphold the objection and allow the application dated 12th May 2006 and filed on 15th May 2006 for the following reasons:-

(i). Objection to attachment of household goods has been upheld because the objectors' demonstration that she was in gainful employment and could have purchased those items from her earnings was not ousted by the judgement creditors arguments for the reasons given.

(ii). Being conceded that the objector and judgement debtor were man and wife allegedly estranged, it could not be ruled out that both could acquire jointly and severally items of common usage. In such circumstances it would be difficult to draw a clear line or distinction between what is owned by the husband on the one hand and the wife on the other. In the absence of such or clear distinction, the wives' rightful claims to ownership of any of household items of common usage cannot be ruled out.

(2) In the absence of production of the application for transfer form, for the transfer of the subject Motor vehicle KAN 169N from the judgement debtor to the objector, this court, cannot be in a position to rule that the application was after the attachment and therefore tainted.

(3) Since the transfer to the objector has been effected as demonstrated by the changes evident in the log book exhibited, as per persuasive decision in the case of **KENYA OIL COMPANY (SUPRA)** that transfer is as good as any other until upset and ousted.

(4) There is no cross application from the judgement creditor to have that transfer set aside. And as long as it stands the objectors objection to the motor vehicle attachment is valid and is accordingly upheld.

(5) The objector will have costs of the application

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2008

R. N. NAMBUYE

JUDGE