



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 337 OF 2007

BASHIR AHMED AWAN.....1ST PLAINTIFF

SHAKEEL AHMED AWAN.....2ND PLAINTIFF

IMRAN SOHAIL AWAN.....3RD PLAINTIFF

VERSUS

ASAD ANWAR.....DEFENDANT

AND

CORPORATE PARK LIMITED.....OBJECTOR

RULING

Before me is an application by the objector purportedly made under the provisions of **Order XXXVIII Rule 10 and 12** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking the lifting of the order of attachment before judgment made by this court in respect of all that parcel of land known as LR No. 196/33 (Orig.No.196/15/14) (*hereinafter referred to as the suit property*). The grounds in support of the application are stated on the face of the application. The objector stated that by the time the court issued the order attaching the suit property before judgment, the defendant had already, on 6th October 2006, sold the said suit property to the objector. The objector was of the view that having paid the purchase consideration in full before the said order of the court attaching suit property was made, he was an innocent purchaser for value without notice. It was the objector's case that It should not be made to suffer for the liability of the defendant in this suit to the plaintiff. The objector maintained that he had priority over the suit property since it had an equitable and legal right that was first in time. The application is supported by annexed affidavit of Kiran Patel, the managing director of the objector.

The application is opposed. Bashir Ahmed Awan, the 1st plaintiff swore a lengthy replying affidavit in opposition to the application. In the said affidavit, the 1st defendant deponed that the alleged transfer of the suit property to the objector was meant to defeat his claim against the defendant. He deponed that, by the time the objector was purported to have purchased the suit property, the court had already issued an order attaching the suit property pending the hearing and determination of the suit. He swore that the transfer in respect of the suit property, having not been registered before the order restricting any transaction in respect of the suit property was made by the court, the objector in the circumstances had no interest capable of being recognized in the law. The 1st plaintiff was of the view that since the defendant was still the registered owner of the suit property, the order issued by the court attaching the said property

was lawful. He deponed that the objector's remedy lay against the defendant and not the plaintiff. He urged the court to dismiss the application since, in his view, the issues being canvassed by the objector were already dealt with by the court and a determination rendered. He swore that the application before the court was therefore *res judicata*.

At the hearing of the application, I heard the rival submissions made by Mr. Nyende on behalf of the objector and by Mr. Okong'o on behalf of the plaintiff. I have carefully considered the said arguments made. I have also carefully considered the pleadings filed by the parties to this suit in support of their respective opposing positions. The issue for determination by this court is whether the objector made a case to entitle this court lift the order of attachment before judgment made in favour of the plaintiff. Before giving reasons for my decision, it is imperative that the record of the proceedings so far in this case be set out. On 14th August 2007, Okwengu J ordered the defendant to furnish security in the sum of US\$343,000 in the satisfaction of the decree that may be entered against the defendant. The defendant was required to furnish the said security within a period of sixty (60) days of the date of the order.

In the interim period, the court issued a restriction order restraining any transaction, including registration of any instrument, regarding the suit property pending the furnishing of the security. In her ruling delivered on 18th October 2007, the learned judge observed at page 3 as follows;

"The defendant has further admitted that he is not only in the process of disposing of his land LR 196/33 but purports to have actually disposed of the land. In support of this, he has annexed a copy of a transfer dated 8th August 2007 which although duly executed has not been registered at the lands office nor is there any evidence of stamp duty having been paid. The implication is that if at all there is such a transaction then the same is in the initial stages and has not gone through. The timing of this transaction, taken together with the affidavit evidence of Christopher Bruce Greeves sworn on 25th July 2007, which avers that as at 20th July the property was still being advertised for sale, confirms the plaintiff's fears, that the defendant is intending to dispose of his property in a bid to obstruct or delay the possible execution of the decree that may be passed against him."

The objector apparently was dissatisfied with the said ruling. On 19th November 2007, the objector sought the leave of the court to be enjoined to the suit. The objector and one Kiran Patel (*as agent of Mitras International Trading LLC*) sought to be enjoined in the suit as 2nd and 3rd defendants respectively. Okwengu J considered the rival arguments presented before her by the objector and the plaintiff. In her ruling delivered on 10th April 2008, she had this to say in declining the objector's application to be enjoined in the suit:

*"Moreover, the applicants have no interest in this suit, other than its claim that it has purchased the suit property. It is however, clearly admitted by the applicants that the intended transfer to the applicants of the suit property has not been registered notwithstanding the allegation that payment was made about a year before (i.e. 23rd August, 2006). The transfer not having been registered, it is not binding on 3rd parties and the restriction order issued by the court on 14th August 2007, takes priority. Indeed, the issue of the sale of the suit property was raised and considered by the court on 14th August 2007 before the restriction order was given. Under **Order XXXVIII Rule 10** of the **Civil Procedure Rules**, attachment before judgment cannot affect the rights existing prior to the attachment of persons not parties to the suit. In this case, the applicant may have been involved in negotiations for the transfer of the suit property to it, however, that interest not having been registered against the title had not crystallized and was therefore not existing at the time the order of this court was made. For this reason, I find that it would not be appropriate to have the defendants enjoined in this suit. Any right or relief that the applicants may be having is as against the defendant and not the plaintiffs."*

In the present application, the objector argued that it is the legal owner of the suit property and therefore in the premises the court should issue an order lifting the order of attachment of the suit property before judgment. It was the objector's case that the suit property was sold a year before the plaintiff obtained the order of the court attaching the suit property. Mr. Nyende for the objector submitted

that the defendant had executed all conveyancing documents transferring the suit property to the objector. The objector had even paid stamp duty but was prevented from lodging the documents to be registered as the owner thereof at the Lands registry due to the fact that a restriction had been placed on the suit property pursuant to an the order issued by this court.

The objector urged the court to find that it is the equitable and legal owner of the suit land and therefore entitled to have the restriction order lifted. The plaintiffs on their parts were of the view that the issues that the objector was seeking to canvass before this court in the present application were issues which had substantially been dealt with and a decision rendered by this court. It was the plaintiffs' case that the court had already made a finding that the purported sale by the defendant of the suit property to the objector was for the sole purpose of defeating the plaintiffs' claim. The plaintiffs urged the court to find that the issues being raised in the present application were *res judicata*.

It is evident from the foregoing that the objector made effort to reverse the order issued by this court attaching the suit property before judgment. In the first instance, the objector sought to be enjoined as a defendant in the suit. Its application was disallowed by the court. The court ruled that the objector had no cause of action against the plaintiffs. The court noted that the objector's remedy lay in pursuing its claim against the defendant. The objector did not appeal against the said decision of the court. Instead, the objector filed another application in a different capacity – that of an objector. It is clear to this court that the objector, by filing the present application, is seeking to have the court render a second opinion on the decision previously made by the court which was to the effect that it appeared that the defendant had 'sold' the suit property to the objector to defeat the plaintiffs' claim. That cannot be.

The objector cannot re-litigate issues which were canvassed previously before this court and a decision rendered. It appears that the objector is labouring under the illusion that the observations made by Okwengu J regarding the circumstances under which the suit property was allegedly sold to it by the defendant were *obiter dictum*. The said comments, in my considered view, were not *obiter dictum* since they addressed the actual matters that were the subject of the application for joinder of the objector as a party to the suit that was disallowed by the court. I agree with the submission made by the plaintiffs that the issue regarding the ownership of the suit property and whether the objector was entitled to be registered as the owner thereof, was an issue which was addressed and dealt with by Okwengu J in her ruling made on 10th April 2008. It is therefore clear that the current application by the objector is misconceived and is meant to re-litigate an issue which has already been argued and a decision rendered.

The application by the objector dated 26th June 2008 lacks merit. It is hereby dismissed with costs to the plaintiff.

DATED at NAIROBI this 7th day of OCTOBER, 2008.

L. KIMARU

JUDGE