



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 152 of 1995

DUNCAN KAMBA KATABWAPLAINTFF

VERSUS

KITUI EASTERN BUS SERVICES

JOHN KATANA SAMUEL VELALA.....

.....DEFENDANTS

RULING

1. On 12.8.2008, I made certain orders in Objector Proceedings instituted by one Shamim Salim and one Salim Sheikhan. They had claimed that they had nothing to do with the present suit and the purported attachment levied against them in execution of the judgment and decree passed against the Defendants was erroneous. At the end of my Ruling and of relevance to the present Application, I ordered that Kshs. 200,000/= paid to the Auctioneer, one Joseph Nderitu t/a Jogan Driers Services be returned to the objectors failure to which this court would take the necessary action.
2. What is now before me is an Application under Order XLIV Rule 1 of the Civil Procedure Rules by the said Auctioneer seeking the following orders;
 - "i.**
 - ii. *That there be a stay of execution of the orders issued by this Honourable court on 12th August, 2008 pending the hearing of this application.***
 - iii. *That this Honourable court be pleased to review the orders issued on 12th August 2008.***
 - iv. *That the applicant herein be granted leave to put in a Replying Affidavit in relation to the objection applications dated 22nd July 2008 and 10th July, 2008.***
 - v. *That such other or further orders be made as this Honourable court may deem fit to grant.***

vi. ***That costs be in the cause.***”

3. In his Supporting Affidavit sworn on 17.9.2008 and a Further Affidavit sworn on 25.9.2008 the said, Auctioneer raises the following issues.

i. that when he received the warrants of attachment in this suit he issued a proclamation notice against he “***judgment-debtor***” and on 28.6.2008 the “***Defendant herein***” paid Kshs. 200,000/= and promised to pay the balance within a month.

ii. that Salim Sheikhan aforesaid presented himself as “ ***the director of Kitui Bus Services***”.

iii. that he forwarded Kshs. 50,000/= to the Plaintiffs advocates and retained Kshs. 150,000/= as “***labour costs***”

iv. that therefore this is a proper case for review so that all the facts relating to the attachment can be placed before this court.

4. I have taken into note the Replying Affidavit sworn on 19.9.2008 in which Salim Sheikhan strongly refutes all the facts raised in the Auctioneer’s Affidavits aforesaid. I have also taken into account the submissions by Mr. Kimani for the Auctioneer and Mr. Nyakundi for the Objector.

5. To my mind the Application is completely misguided and is an abuse of the court process for the following reasons;

6. Firstly, the Auctioneer is not a party to this suit and whereas Order XLIV Rule 1 allows any party aggrieved by an order of court to seek a review thereon, he cannot benefit from those orders because he is attempting to re-open objector proceedings that were settled and determined upon this court hearing parties inter-partes. In the Ruling resulting therefrom, I determined that as a matter of fact and law the attachment against the objectors was illegal. I maintain that position and there is nothing the Auctioneer has stated that can change that position. He jubilates at the fact that he honestly believed that Salim Sheikhan was a director of Kitui Bus Services and therefore the alleged attachment was proper. The basis for that obviously misplaced belief has not been given and in my earlier Ruling I addressed that issue in extenso. Further, that he issued the receipt for Kshs. 200,000/= in the names of Kitui Bus Services but again I addressed the misnomer in that entity and it is not enough to depone that someone held himself out as a director of that entity. Where, in the Objector Proceedings or in the present Application has that issue been lawfully established? I submit nowhere and my earlier holding on the subject remains true.

7. Secondly, the Auctioneer in his Affidavits raises many issues about the lengths to which he went in order to effect attachment but he fails to show one thing; what is the legal and properly acceptable connection between the two Defendants in this suit and the objectors? He should have gone ahead to show that evidence with, say search documents showing that the objectors were/are directors or the same as Kitui Bus Services. He failed to do so and his attachment remains as unlawful as it was ab intio and his continued protestations to the contrary is completely unsupported by any evidence in fact or in law.

8. Lastly, the Auctioneer as an officer of this court cannot purport to enter into a dispute and take the side of the Plaintiff whose claim to the attachment has properly been overruled.

9. The application is dismissed without any order as to costs. The Auctioneer will instead comply with the orders of 12.8.2008 within 14 days failure to which such action as this court deems necessary will be undertaken.

10. Orders accordingly.

Dated and delivered at Machakos this 25th day of **November 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Kimani for Applicant.

No appearance for Respondent.

Isaac Lenaola

Judge