



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 540 of 2004**

**TM-AM CONSTRUCTION GROUP (AFRICA) .....PLAINTIFF**

**VERSUS**

**TUMAC ENGINEERING SERVICES.....DEFENDANT**

**AND**

**JOHN PETTERSON.....OBJECTOR**

**R U L I N G**

Before me are objection proceedings expressed to be brought under Order XXI rules 56 and 57 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The Objector prays that the warrants of attachment issued on 25.5.2006 in respect of the primary and secondary cone crusher units and their associated parts (hereafter “the property”) be lifted and the intended attachment or attachment and sale of the property be declared null and void and bad in law. The application is made on the following primary grounds:

- (a) *That the objector claims an equitable interest wholly in all the property proclaimed.*
- (b) *That the property is trust property held by the defendant/judgment debtor (as trustee) upon trust for the objector (as beneficiary).*
- (c) *That the defendant/judgment debtor does not hold the property as the legal owner thereof and therefore the decree issued should not be executed against the property.*

The application is supported by an affidavit of the Objector sworn on 21.7.2006 to which is annexed a document titled “**Declaration of Trust.**” The application is opposed and there is a replying affidavit of one Mahesh Bhatt a director of the decree/holder sworn on 13.10.2006. Annexed to the affidavit is a sale agreement between the decree/holder and the judgment/debtor in respect of the property.

The application was argued before me on 1.3.2007 by Mr. Kerongo Learned Counsel for the Objector and Mr. Eboso Learned Counsel for the decree holder. Mr. Omondi represented the Judgment debtor and merely supported the objector. The central issue in objection proceedings is whether or not the Objector can show that he has a legal or equitable interest in the property attached in execution of the decree. The burden of proof is on a balance of probabilities. The Objector’s case is that he advanced USD 250,000 to the judgment debtor for the purchase of heavy construction machinery on verbal terms that the judgment debtor would repay the sum on demand or alternatively offer to the objector the machinery as collateral to secure the repayment of the said sum. When he sought the repayment, the judgment debtor indicated that he did not have funds to repay the advance and in August, 2005 the judgment debtor agreed to create a trust in favour of the Objector over the same property. The alleged Declaration of Trust is annexed as

“**JP1**”. In his understanding on the creation of the trust, the property was held by the judgment debtor (as **trustee**) on trust for the objector (as **beneficiary**). In the premises the objector argues that he has an equitable interest in the said property and the same cannot therefore be attached in execution of the decree issued against the judgment debtor.

In opposition to the application it was argued that the property attached is the same property in respect of which the judgment debtor had entered into a contract of purchase with the plaintiff decree holder and whose purchase price the judgment debtor had failed to pay in full and which gave rise to the suit between the plaintiff and the judgment debtor. In support of its claim the plaintiff has annexed the agreement of sale in respect of the property and maintains that the purported declaration of trust having been made in respect of the same property is a fraud put in place for the sole purpose of obstructing the decree holder from recovering the unpaid purchase price of the property the foundation of the decree. Counsel for the decree holder discredited the declaration of trust for several reasons. The primary reasons were that the same was purportedly created by the directors of the judgment debtor at a time when they knew that the full purchase price had not been paid and in fact in anticipation of the decree herein as there was pending in court an application for summary judgment. Further there was no evidence that indeed the objector had advanced any money to the judgment debtor. In any event counsel for the decree holder wondered how the judgment debtor a limited liability company could enter into an oral agreement with the objector. Counsel also attacked the purported declaration of trust on the basis that the same was inadmissible by virtue of the provisions of the Registration of Documents Act Chapter 285 and by virtue of the provisions of the Stamp Duty Act Chapter 480 of the Laws of Kenya.

Having considered the application, the affidavits filed and the arguments of counsel, I take the following view of the matter. The principal document relied upon by the objector in attempting to establish his interest in the property is the declaration of trust. That document recognized that the subject of the trust was the same property which had been bought by the judgment debtor from the decree holder. It was dated 1.9.2005 and was purportedly executed by the directors of the judgment debtor on 14.9.2005 and 7.10.05. It does not appear to have been under the seal of the judgment debtor and only one director appears to have purported to witness the seal of the judgment debtor which seal as I have stated is missing from the document annexed as “**JP1**”. The said document also refers to purchase price having been furnished and provided by the objector. There is however no evidence that any funds were furnished by the objector. At paragraph 2 of his affidavit in support of his objection the objector deponed that in September, October and November, 2003 and March, April and May 2004 he advanced various amounts of money totaling to USD 250,000.00 to the judgment debtor for purposes of purchasing heavy construction machinery. The judgment debtor is a limited liability company and must have acknowledged such payments in some way for the objector’s record. It cannot be believed that such a large sum of money could have been advanced without any documentation. The objector further swore at paragraph 3 of his said affidavit that it was orally agreed between him and judgment debtor that the latter would repay the said sum on demand or alternatively would offer the same machinery as a collateral to secure the repayment of the said sum. How could the judgment debtor a limited liability company enter into an oral agreement in respect of such a crucial transaction. The objector does not disclose with whom of the officers of the judgment debtor, the oral agreement was made.

It is rather disturbing that the purported declaration of trust was attested by the former counsel for the judgment debtor. The directors of the judgment debtor and counsel for the judgment debtor were alive to the fact that the same property had been bought from the decree holder and balance of purchase price was the subject of the claim pending against the judgment debtor. Indeed at the time, the decree holder had filed its application for summary judgment. In my view, the bonafides of purporting to create a trust in those circumstances are questionable. I cannot escape the conclusion that the purported creation of trust was merely intended to scuttle the execution in a less than candid manner. The document in any event is not admissible under the provisions of the Stamp Duty Act and also violates the provisions of the Registration of Documents Act. If the arrangement between the judgment debtor and the objector were to succeed, it would be so easy for debtors to escape their liabilities. All they would have to do would be to draw up such a document as exhibited herein and swear that the attached property belongs to a trust. The court cannot countenance that kind of result.

In the premises, I am not persuaded that the objector has established his claim over the property whose proclamation and attachment he questions. The defendant filed no response to these objection proceedings and in my view the objector did not show, as he should have, that the judgment debtor does not have attachable interest in the property.

The upshot of this matter is that the objection is dismissed with costs to the decree holder. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2007.**

**F. AZANGALALA**

**JUDGE**

**19/3/2007**

Read in the presence of:-