



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 1253 of 2001

TRANSNATIONAL BANK LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

GEORGE ODENY NGURE..... DEFENDANT/JUDGMENT DEBT

AND

JAMES A. OPUK OKIYA.....OBJECTOR

RULING

The parties in this matter agreed that the Decree holder's application dated 27.2.2007 be deemed a reply to the Objector's application dated 23.2.2007. The Objector's application is expressed to be brought under order XX1 Rule 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 attachment of Title No. Nairobi/Block 90/43 in execution of the decree herein be raised on the primary ground that he is a purchaser of the suit property and is not a party to these proceedings. The application is supported by an affidavit sworn by the Objector. To the affidavit is annexed a copy of an agreement for the sale of the said property dated 27.2.2006. It is deponed in the affidavit that the said property was sold to the Objector by the Judgment debtor at KShs.6,000,000.00 of which KShs.3,000,000.00 has been paid by the Objector leaving a balance payable 7 days after receipt of registered documents. Subsequent to the said sale, the Objector lodged a caution against the said property which caution was registered on 6.4.06. The Objector accordingly contends that the said property is not available for attachment by the decree holder herein.

The decree holder, Transnational Bank Limited, in its application being deemed a reply to the objector's application seeks one primary order that the court do nullify the purported sale agreement entered into between the judgment debtor and the objector to the exclusion of the decree holder and alternatively the court do order the judgment debtor and/or objector to deposit the proceeds of the sale with the court. The decree holder's stand is predicated upon the following main grounds:-

- 1) That the decree holder has both an equitable and legal lien over the said property being the holder of an equitable charge by way of deposit of the title to the said property.
- 2) That the decree holder has further registered a prohibitory order over the said property.
- 3) That by virtue of the said equitable charge the judgment debtor could not purport to sale the said property.

- 4) That in March, 2006 the judgment debtor confirmed on oath that the property was his and the purported sale is intended to obstruct execution.
- 5) That the purchaser's interest is void as the debtor could not purport to give good title to the objector where he had none.

In an affidavit sworn by one Jacqueline Onsando the Legal and Human Resources Manager of the decree holder it is deponed inter alia that the judgment debtor obtained overdraft facilities from the decree holder which were secured by way of a deposit of the judgment debtor's said title; that the judgment debtor executed an equitable mortgage and deposited the Title deed with the decree holder but did not repay the facility; that efforts to perfect the security by the creation of a legal charge were futile due to faults on the title and prior encumbrances; that the decree holder then filed suit and obtained judgment against the debtor on 2.3.2006 and the decretal amount now stands in excess of KShs.7,000,000.00. That the decree holder then registered a prohibitory order on 29.9.2006 which ranked in priority to the objector's interest.

In the premises according to the decree holder, the objection proceedings are an attempt by the debtor to refuse to pay the debt owed to the decree holder.

The application was argued before me on 28.5.2007 by Mr. Sagana Learned counsel for the Objector, Mr. Mwagona, Learned counsel for the decree holder and Mr. Thiga, Learned counsel for the judgment debtor. I have considered the application and the affidavit in support and the documents in opposition thereto. I have also given due consideration to the submissions of the counsels appearing. Having done so, I take the following view of the matter. 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 the balance of probabilities. The objector's case is that he has purchased the said property. He has in that regard paid KShs.3,000,000.00 as part payment of purchase price with the balance agreed to be paid 7 days after receipt of the registered documents. To protect his interest he registered a caution against the said property which caution having been registered prior to the Prohibitory Order ranks in priority to the same. In the premises, the objector argues that he has a purchaser's interest in the said property and the same cannot therefore be attached in execution of the decree issued against the judgment debtor.

In opposition the decree holder has argued that the property attached had been offered as security to it by the judgment debtor save that the security was not perfected hence the suit and the resultant decree. In its view, the purported sale to the objector is a scheme indeed a fraud put in place by the judgment debtor and the objector for the purpose of obstructing the decree holder from recovering its debt.

In my view, the decree holder's rights are not rights of a chargee as that relationship came to an end when the decree holder opted to sue the judgment debtor for the sums allegedly secured by the said property. When it obtained a judgment and the subsequent decree, the decree holder became an ordinary decree holder and not a secured creditor. The decree can only be executed as provided under the Civil Procedure Act and that in fact is the basis upon which it obtained and registered a prohibitory order against the said property.

The objector's interest on the other hand is supported by the agreement of sale annexed by the objector to his affidavit in support as "**JA001.**" The same is dated 27.2.2006. The Certificate of Official Search shown to me shows that the objector lodged a caution against the said title on 6.4.2006 claiming a purchaser's interest. It is clear therefore that the objector's interest was registered in priority to the Prohibitory Order which was registered on 29.9.2006. It cannot be said therefore that as at the time of the sale agreement or the registration of the caution the purchaser had knowledge or notice of the decree holder's interest. I therefore find and hold that whereas the judgment debtor's bona fides may be in question, the objector's interest cannot be tainted by any impropriety of the judgment debtor.

In the end, I am persuaded that the objector has established his claim over the property whose attachment he questions and after the agreement of sale the judgment debtor does not have attachable

interest in the said property. The upshot is that the objector's application dated 23.2.2007 is allowed as prayed.

The judgment debtor to pay the costs of both the decree holder and the objector.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Washe holding brief for Okoth & Kiplagat for the Decree holder and Thiga for the defendant and holding brief for Sagana for the objector.

F. AZANGALALA

JUDGE

17/7/07