



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI MILIMANI LAW COURT
CIVIL SUIT 581 OF 2001

DAVID KIYAGA MULINDWA

FRIDAH KIYAGA MULINDWA.....PLAINTIFFS

VERSUS

ROYAL RESERVE MANAGEMENT COMPANY LTD.....DEFENDANT

AND

LEADING RESORTS OF THE WORLD CO. LTD.....OBJECTOR

RULING

On 23.3.2007, the applicant/objector through its advocates lodged a Notice of objection against attachment commenced by the plaintiff/decree holder pursuant to a decree issued in this suit. The decree holder through their advocates intimated their intention to proceed with attachment and served a notice to that effect upon the objector's advocates. The latter advocates then filed a chamber summons under order XX1 Rules 56 and 57 seeking to establish the objector's claim. That application was lodged on 13.4.2007 but was not served upon counsel for the decree holders. By their letter dated 11.7.2007 the decree holders' advocates applied for renewal of the warrants of attachment on the basis that the decretal amount remained unpaid. The warrants were accordingly extended resulting in a second attachment of the same goods which are the subject of the objector's application.

The application was supported by an affidavit sworn by Geoffrey Maina the Objector's advocate. In his affidavit Mr. Maina deponed that although the chamber summons setting out the objector's claim was filed in accordance with the provisions of order XX1 Rules 56 and 57, his clerk inadvertently forgot to take a hearing date and serve the same. Mr. Maina further deponed that it was the objector's contention that as its application had not been determined, the same operates as a stay of attachment and the attachment made during the currency of the application was unlawful and illegal.

The application was opposed by Ms. Njogu counsel for the decree holders who argued that failure to serve the chamber summons to establish the objector's claim was fatal and the decree holders were entitled to apply for re-issue of warrants of attachment against the same goods. Ms. Njogu placed reliance upon two decisions of the High Court in which failure to serve a defence and summons to enter

appearance led to entering judgment and striking out of a suit respectively. Mr. Maina replied that the cases cited by the decree holders' advocate were not relevant as in those cases the Rules provided for a specific time limitation which is not the position herein.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of this matter. Rules 56 and 57 aforesaid read as follows:-

“56. Should the attaching creditor in pursuance of a notice issued under rule 54 intimate to the court and the objector that he proposes to proceed with the attachment, the objector shall take proceedings to establish his claim within 10 days of service upon him of such intention.

57. (1) Proceedings in pursuance of rule 56 shall be by summons in chambers supported by affidavit in the suit in which the application for attachment was made.

(2) Such summons shall be served on the attaching creditor and unless the court otherwise directs on the judgment debtor

(3) A summons under this rule shall operate as a stay of attachment unless the court otherwise orders.”

It is not in dispute that when the decree holders intimated their intention to proceed with attachment, the objector took out its chamber summons to establish its claim on 13.4.2007 which was within the period prescribed by rule 56 of Order XX1 of the Civil Procedure Rules as the Objector's advocates were served with notice issued under the rule on 4.4.2007. It would appear that although sub rule (2) of rule 57 requires that the Objector's summons be served upon the decree holder, the rule does not provide for a limited time within which such service has to be effected.

Sub rule 3 of the same rule is however quite clear that such summons operates as a stay of attachment unless the court otherwise orders. The rule does not provide that the summons operates as a stay of attachment only when the same has been served. That interpretation in my view would unnecessarily fetter the operation of the sub rule. I dare say that even if a limited time within which the summons was to be served were provided, the court would still have power to extend such time under the provisions of Order XLIX rule 5 of the Civil Procedure Rules. I agree with counsel for the objector that the cases cited by counsel for decree holders are not relevant as in those cases a limited time was fixed for the doing of the acts by the respondents. That is not the case in the matter at hand.

In the premises, I am satisfied for the above reasons that the objector's application is altogether not without merit. Accordingly, I allow the application in terms of prayers 4 and 5 thereof. The orders are granted on terms that the objector pays the Decree holder's costs which should include the auctioneer's charges, to be agreed if not taxed by the Deputy Registrar of this court. The objector is also ordered to prosecute its application dated 13.4.2007 with dispatch and in that regard, a hearing date should be given at the registry on priority basis.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Njogu Ms for the Debtor Holder and Mukuria holding brief for Maina for the Objector.

F. AZANGALALA

JUDGE

24/10/07