



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**MISC CIV APPLI 35 OF 2003**

**NYAMOGO & NYAMOGO ADVOCATES ..... APPLICANT**

**V E R S U S**

**KENYA BUS SERVICES LTD. .... RESPONDENT**

**R U L I N G**

On 2<sup>nd</sup> June, 2005, Bus registration No. KAQ 905 U was attached by Leggos Auctioneer on instructions of Messrs Nyamogo & Nyamogo Advocates (decree-holders) with a view to being sold to recover Shs.89,217.20 and costs. The decree holders had been awarded the said amount towards costs earned in respect of services rendered to Kenya Bus Services Ltd. (judgment debtor). To recover the costs, the judgment creditor instructed Leggos Auctioneer to attach the judgment debtor's said bus. Notice of objection to the attachment was on 24.6.2005 filed by Industrial and Commercial Development Corporation (Objector) erroneously pursuant to Rule 54 of Order XXI instead of Rule 53 (1) of the said Order of the Civil Procedure Rules. On 24-6-2005, Notice of Stay of Execution was issued by the court pursuant to Rule 54 of Order XXI whereupon the decree-holders on 8-7-2005 filed pursuant to rule 56 of Order XXI Notice of Intention to proceed with execution.

On 20-7-2005, the Objector filed a Chamber Summons application premised on Rules 56 and 57 of Order XXI of the Civil Procedure rules. The substance of the objection is that the attached bus is owned by the objector jointly with the judgment debtor and the bus was on lease hire from the objector which was owed a sum in excess of Shs.6 million by the debtor. The copy of the log book for the bus marked as annexure B attached to the affidavit of Grace Magunga sworn on 15-7-2005 in support of the application seeking an order for lifting of the attachment shows that the said bus is registered in the joint names of the debtor and the objector. It does not reflect, as one would expect, registration either of a chattels mortgage in favour of the objector as hirer qua lender or the name of the objector alone as owner who had leased out the bus. Instead, it shows that the vehicle is legally owned by the objector and the debtor jointly. In paragraph 6 of the supporting affidavit, the objector avers that by virtue of the Hire Purchase Agreement exhibited as annexure "C" attached to the Objector's supporting affidavit, the bus belongs to the Objector which was entitled to payment from the debtor to a sum of Shs.6,361,73/= on account of the Hire Purchase Agreement. The Objector alleged it will suffer irreparable damage if the bus is sold.

Mrs. Osodo, learned counsel for the Objector, told the court on 22-5-2007 that the bus is owned by the Objector and the debtor and that the objector was not privy to the case between the decree-holder and the debtor which led to the attachment of the bus.

Mr. Nyamogo, learned counsel for the decree holder, contended that the objector's application was defective as it did not lie. It was his submission that the correct rules were not invoked. But this does not seem to hold correct as the Chamber Summons does cite rules 56 and 57 of Order XXI of the Civil Procedure Rules which are the relevant rules in the matter although the application does needlessly cite section 3A of the Civil Procedure Act, Cap 21. But this does not render it bad or defective. He further submitted that Rule 57 (2) of Order XXI had not been complied with. The Rule requires the Chamber Summons to be served on the attaching creditor and, unless the court otherwise directs, on the judgment debtor. The affidavit of Mr. Nyamodi Ochieng Nyamogo, an advocate and partner in the decree holder's firm sworn on 26-9-2005 in reply to the Objector's application shows that the decree holder was served. But there is no evidence that the debtor was served and this point was not taken up by Mrs. Osodo in her reply. What is the effect of non-compliance with Rule 57(2) (supra)? It was Mr. Nyamogo's submission that the application was defective. It was also his submission that as the auctioneer who had attached the

bus had not been joined, the application sought an order against a non-party against which it could not be enforced.

I have perused the objector's application and the replying affidavit by the decree holder. I have also given due consideration to the submissions made by Mrs. Osodo on behalf of the Objector and Mr. Nyamogo on behalf of the decree-holder. The issue for determination is whether the objector has established its claim over the attached bus to warrant the grant of the orders sought, namely lifting of the attachment of the bus. The burden of establishing the claim reposes on the objector and the standard of proof is on the balance of probabilities.

The bus is jointly owned by objector and the judgment debtor. The debtor did not participate in the objection proceedings and there is no evidence it was served with the application. But while this is improper, it does not render the Objector's application incompetent. Both the debtor and the objector were joint legal owners of the bus, and the only question is whether a chattle such as a bus can be attached and sold by a creditor on account of debts of one of the joint owners? The issue of hire purchase does not arise as the bus is not in the name of the Objector as hirer and there is no chattels mortgage either registered against the bus. It seems that the debt said to be owed by the debtor to the Objector is not secured on the bus but rather on the contract referred to as the hire purchase agreement. At any rate, the Objector qua creditor has become a co-owner of the bus. The Objector therefore has title to the bus as does also the debtor. The Objector does not owe the decree holder the fees that led to the attachment of the bus. Can the bus in these circumstances be attached to recover the fees, the interest of the Objector in the bus notwithstanding? In equity it would not be fair to attach and dispose of the interest of the Objector in the bus unless the Objector knew or ought to have known of the debt and had interest in the transaction in which the debt was created. If the Objector knew and had interest in the transaction then, the Objector would be expected to know that non payment of such debt would expose the bus to attachment. The issue relating to the debt owing by the debtor to the Objector is therefore not relevant here. It seems to me that if the Objector was involved in and stood to benefit from the creation of the debt due by the debtor to the decree holder that gave rise to the attachment then the bus as a joint property can be justifiably attached. But the debt is for legal services rendered by the decree holder to the debtor. There is no evidence that the Objector knew or ought to have known that the debtor was receiving legal services which put the bus at risk. In any case, the Objector had no interest in the services rendered. And at any rate, the joint registration of the bus in the names of the Objector and the debtor put the bus at par with partnership property. The debt was not incurred, it seems, for the benefit of both joint owners that is to say, the debtor and the objector.

As there is no evidence that the Objector had interest in the matter in which the legal services were rendered, it is my finding that the bus cannot be lawfully attached. For this reason, it is my further finding that the Objector has established its claim. The attachment is hereby lifted. The application is allowed with costs. It is so ordered.

*Delivered at Kakamega this 8<sup>th</sup>.day of November, 2007*

**G. B. M. KARIUKI**

**J U D G E**