



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**Civil Case 528 of 2003**

**ADDAH KISAI WAKESHO ..... PLAINTIFF**

**VERSUS**

**STANLEY WAMWANDU MWAWASI ..... DEFENDANT**

**R U L I N G**

This is an application brought under Order XXI Rules 56 and 57 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of the law. The application is by Crescent Construction Company Limited as the objector. One primary Order is sought and that is that the attachment of all the goods proclaimed by the Creditor and/or her agents M/S Keysian Auctioneers on 13.6.2005 be lifted and cancelled.

There are two main grounds for the application and these are that the Objector is the legal owner of all the goods proclaimed and the same came into the possession of the judgment-debtor pursuant to a contract entered and executed between the Government of Kenya and the Objector. The application is supported by an affidavit sworn by one Mohammed Ashiraf, the Objector's Managing Director. There are 5 exhibits annexed to this affidavit.

The application is opposed on the basis of Grounds of Objection filed by Advocates for the plaintiff/decreed holder. The application was canvassed before me on 9.12.2005 by Mr. Muturi, Learned Counsel for the Objector and Mr. Munyu, Learned Counsel for the plaintiff/decreed holder.

For the objector to succeed, it had to show on a balance of probability that it is entitled to a legal or equitable interest in the attached property and further that the judgment debtor does not have attachable interest in the same property. The case of the objector is that in or about December 1992, it executed a contract with the Government for the repair and resealing of Athi River –Kajiado-Namanga Road. On 18.3.94, the defendant/judgment-debtor was appointed to represent the Chief Engineer (Roads) for the purposes of supervising the performance of the contract. Pursuant to the said contract, the Objector provided the defendant with a furnished house including a television set and a music system. During the pendency of the contract the defendant moved from the said house to his own house with the goods supplied by the Objector under the contract. However, the Objector did not retrieve the goods after the contract as it anticipated using the goods for future commitments. On the premises, the Objector claims to be the legal owner of the said goods.

In opposing the application, Counsel for the plaintiff/decreed holder submitted that the objection proceedings were frivolous and devoid of merit. In Counsel's view, the Objector had not proved that it owned the goods attached. It had merely alleged that it provided a furnished house to the defendant but no evidence had been exhibited to show ownership. There were no documents of title, no inventory, no link between the Objector and the goods. Counsel relied upon the case of **Kenya Oil Company Ltd. Vs. Fuaad Mahmoud Mohammed and Another: HCCC No.886 of 2002 (UR)** for the proposition that the burden of proof is on the Objector to establish a legal or equitable interest in the property subject matter of the execution objected to.

I have now considered the application. I have also perused the record of this case and carefully listened to submissions of Counsels appearing. Having done so, I take the following view of the matter.

As stated earlier on in this ruling, the applicant had to show that it was entitled to a legal or equitable interest in the attached property and further that the judgment-debtor does not have attachable interest in the same property. The Objector has sought to establish ownership of the subject property with evidence that it executed a contract with the Government for the repair and resealing of a road under which contract the Objector provided a furnished house to the defendant judgment-debtor who was to supervise the performance of the contract. A copy of the contract is exhibited and it shows that indeed a furnished house was to be provided to the defendant and was indeed provided. In my humble opinion this does not amount to proof of title to the attached goods. Indeed, none of the documents exhibited by the Objector show the Objector's title to the attached goods.

The Objector states that during the pendency of the contract the defendant moved out of their furnished house to his own house with the furnishings and the reason given for failure to retrieve the goods earlier is that the Objector anticipated using the goods for future commitments. I do not see the logic in this at all. In my view, the anticipation of future commitments should have been the reason for earlier retrieval of their goods.

The Objector is not clear on when the defendant moved from its furnished house. It is however stated that the contract was fully performed and concluded in November 2003. The attachment being objected to took place on 13.5.2005, more than 1 ½ years after the conclusion of the said contract. The goods were attached at the defendant's premises. In these premises, I am not persuaded that the Objector has established its claim to the attached goods. The Objector has not attempted to show that the defendant/judgment-debtor has no attachable interest in the said goods. The Objector has not discharged its burden on a balance of probabilities. That being my view of these objection proceedings, the application dated 8th June 2005 and filed on 8th July 2005 has no merit and is dismissed with costs. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 1st day of February 2006.**

**F. AZANGALALA**

**JUDGE**