



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Civil Appeal 97 of 2005**

**ESTHER AKINYI ODIDI .....1<sup>ST</sup> APPELLANT**  
**MARY AKEYO ODIDI .....2<sup>ND</sup> APPELLANT**  
**ROSE ACHIENG ODIDI .....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**SAGAR HARDWARE STORES LTD.....1<sup>ST</sup> RESPONDENT**

**GEORGE ODIDI KWANYA .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Coram J. W. Mwera Judge,

Odunga for the appellant,

Onsongo for the respondent,

Raymond CC.

On 3/8/2005, Mr. J. G. Gathuku, Resident Magistrate, delivered a ruling after hearing an application dated 25.4.2005 (objection proceedings) brought under Order 21 rule 57 Civil Procedure Rules by the 3 appellants, wives of one George Odidi, the defendant judgment - debtor in CMCC 524/2002. It prompted the present appeal in that the learned trial magistrate in error relied on principle of **estoppel**. Mr. Odunga further argued that the learned trial magistrate fell further in error when he found that the **place** of proclamation of the attached goods was material in deciding the objection proceedings and that when notification of sale of the attached goods was exhibited in the proceedings, that was sufficient and so the learned trial magistrate ought not have found that non-exhibiting of the proclamation was fatal to the proceedings. Some two cases were cited but they did not seem to add much to this appeal.

Mr. Onsongo opposed the appeal by narrating that prior to the objection proceedings being instituted, there had been an earlier attachment. At that time, the parties discussed and filed consent via their lawyers allowing the release of the goods to the judgment - debtor while the latter undertook to pay the decretal sum as per agreed schedule. That the judgment - debtor defaulted in the payments and his goods

were again attached. That it was this second attachment that gave rise to the objection proceedings which, to Mr. Onsongo, were a smokescreen instigated by the debtor (Odidi) that his wives now jump into the fray to frustrate execution. That even if the learned trial magistrate may have alluded to matters that may pass are irrelevant, namely, the place of proclamation and absence of the proclamation itself when deciding the fate of the objector proceedings, yet he was right to accept and put estoppel in the matter because Odidi had led the judgment creditor to act on the representation that the goods be released yet he defaulted in payments - the basis of the consent order to release the goods. That in the light of Section 120 of the Evidence Act, that conduct of Odidi was taken in regard and the objection proceedings were dismissed. That he had all the time led everybody to believe and behave in a manner that showed that the goods were his property.

In deciding this appeal, the court is of the mind that the learned trial magistrate was not correct to consider as relevant and vital to proceedings before him that the objectors ought to have disclosed the place the goods were proclaimed or that a copy of proclamation ought to have been exhibited. It appears sufficient that the objectors displayed the notification of sale. So much for that. Now the estoppel.

In Section 121, Evidence Act, (Cap 80), the following is provided for in what is termed "general estoppel".

"120. When any person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither that he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

In essence, a person should always stand by his word or deed given to another who believes and acts on that word or deed as the truth of the matter. And the person who gave that word or deed to be acted upon cannot be seen to deny the truth of it, as given to the other in any suit or proceeding involving the one to whom the representation was made and the one who represented it or his agent. A great base indeed to bind people to their words or deeds said or done, believed as truth by whom the words or deeds are said or done and who act on the same thereby changing their positions/circumstances. If the truth of the deed or word is changed, those - who believed and acted on it stand prejudiced - hence the protection under Section 120 (above), in case a suit or proceeding ensues.

It is no doubt here that on 14.5.2003, the judgment - debtor's lawyer (Mr. Owalla) wrote to the judgment - creditors' lawyer (M/s Onsongo & Co. Advocates) that after discussions, a consent was to be drafted by the latter for execution so that:-

"----- the household goods attached may be released to the owner (read, Odidi, for judgment - debtor)," because he, Odidi had agreed to liquidate the sum of Kshs 62,910/= due from him to the creditor.

On the same 14.5.2003, M/s Onsongo & Co. Advocates drew up the said consent. It was signed by both parties' advocates and dispatched to the Chief Magistrate. It read in part:-

**"By consent:-**

(a) the attached goods be released to the judgment - debtor on a running attachment pending the fulfillment of the following conditions .....

the conditions included Odidi liquidating the sum owed as per time schedule agreed. The judgment - debtor (Odidi) the **owner** of the goods had them released to him. But he defaulted in the scheduled payments and the goods were attached again. This then was followed by his 3 wives (the appellants) filing the objection proceedings that the learned trial magistrate dismissed.

In considering Section 120 (above) the person who made representation which the other believed and acted upon or his representative cannot turn round and deny the truth of the representative in any suit of

proceeding. The person who represented that the goods attached were owned by him was Odidi the judgment - debtor. A consent order was recorded that he would have his goods back but pay the sum due as per schedule. The goods were released to him but he reneged on his promise to liquidate the debt. When the goods were attached again his wives ran forth with the objection. This court is left with a feeling, also held by the respondent that the judgment - debtor (Odidi) instigated his wives to file the objection proceedings here, as a way to frustrate the respondent's efforts to execute for his money. It is almost, if not wholly true that that is what Odidi did. All the circumstances point to that. He partly paid the debt. The judgment - creditor began to execute for the balance; goods were attached. Odidi pleaded that his goods be released and he would pay that balance. He defaulted; the goods were attached again and his wives who had not objected in the first incident now brought these proceedings. Odidi is a crafty and unreliable person. But be that as it may. His 3 wives (the appellants) cannot and are not shown to be Odidi's representatives under Section 120 who should not be allowed to act contrary to the representation he made to the judgment - creditor on 14.5.2003. So it was in error for the learned trial magistrate to invoke the principle of estoppel to these equally cunning wives when they did not make any representation on 14.5.2003 or can, other than being Odidi's wives, be taken to be his representatives in any suit or proceeding.

In sum, the appeal is allowed but in the circumstances of the case costs go to the respondent. The same to be agreed/taxed and paid in 30 days from the date hereof or following taxation.

Judgment accordingly.

Delivered on 26.5.2006.

**J. W. MWERA**

**JUDGE**

*JM/hao*