



CIVIL PRACTICE AND PROCEDURE
Civil procedure Rules

- · Order 21 Rule 56 and 57 objection proceeding
- · Joining of interest party can only be with leave of the court.

The Auctioneers Rules 1997

- · When does attachment occur?

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 1260 OF 2002

GEORGE GIKUBU MBUTHIAPLAINTIFF

VERSUS

PETER NJERU MUGO.....1ST DEFENDANT

GEOFFREY KARIUKI MWENDA2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....4TH DEFENDANT

R U L I N G

The present application is an objection proceeding brought under Order 21 Rule 56 and 57 of the Civil Procedure Rules.

The subject of the objection proceedings is the motor vehicle KVE 001. The objector contends that the attachment by the 2nd defendant was illegal because the said vehicle is registered in the name of the company ‘Palace Investments Limited,’ the objector hereof. That the vehicle although driven by the plaintiff did not belong to the plaintiff, driving the vehicle did not suffice to prove ownership. That the well-known principle of the case of SALOMON V SALOMON clearly showed there was distinction between shareholders, directors and a limited liability company. That accordingly the individual debts of directors cannot be visited on the company. The objector relied on the case of HCCC NO. 886 OF 2002 KENYA OIL COMPANY LTD V FUAAD

MOHMOUD MOHAMMED. Counsel relied on the following passage: -

“As regards the 2nd objector, I agree with his counsel that the lob book showing, as it does, that he is the

registered owner of motor vehicle KAJ 285M, prima facie he is deemed to be the legal and equitable owner thereof. It was for the plaintiff/deed holder to prove the contrary.....it could not be proved by merely showing that the vehicle previously belonged to the judgment debtor and/or that it was attached while being driven by him.”

The second defendant’s counsel began his argument by attacking the deponent of the affidavit in support of the objector’s proceedings. Counsel argued that the mere fact that the deponent failed to state that she had been authorized by the objector company to swear the affidavit invalidated the affidavit. Counsel further argued that even if the court finds that the affidavit is properly on record the evidence it avers to do not support the objector. Counsel drew the court’s attention to the attachment by proclamation dated 23rd November 2004. The present motor vehicle was covered by the items entitled, other moveable goods. He pointed out that the auctioneer first saw the plaintiff drive the subject motor vehicle on 16th December 2004 but he was unable to obtain possession it was because of the plaintiff’s ‘war like’ behavior and it was not until 22nd December 2004 that he succeeded. The 2nd defendant carried out a search of the motor vehicle of the particulars of ownership as at 23rd November 2004, which search revealed that the vehicle by then was registered in the name of Shabbir brothers. Counsel drew the court’s attention to the log book which he said clearly showed that there were changes in ownership both on the same day, that is 24th November 2004 firstly to MOHAMED AFZAL and secondly to PALACE INVESTMENTS LTD. He said the acquisition of the

motor vehicle by the objector did not show for what consideration the same was acquired. The second defendant also carried out a search of the company PALACE INVESTMENT LTD and it revealed that as at 26th January 2005 the deponent of the affidavit in support of the objector’s proceedings was not a director of PALACE INVESTMENTS LTD; to this counsel suggested that the only inference was that the latter indication that the said Pauline Wanjiru Njuguna was a director was manufactured to counter the 2nd defendant’s arguments.

Having outlined the arguments presented before I will not begin to analyse the same. At the beginning I would like to point out that the joining of the auctioneers in these proceedings without the leave of the court is both misconceived and fatal. The objector ought to have moved this court to join a party before inserting their names in these proceedings.

On the 2nd defendant’s argument that the affidavit of Pauline Wanjiru Njuguna is fatally defective for failure to state that she was authorized to swear the same I believe is misconceived. I so believe because the same Ms Njuguna described herself as a director PALACE INVESTMENTS LTD. Having described herself as a director she did not need to state that she had been authorised to swear the affidavit, after all it is the directors of a company who would rightly given authority. That argument, therefore, is rejected.

In listening to the arguments it does seem that he parties are not in agreement when attachment occurred. Rule 14 of the Auctioneers Rules, 1997 states as follows: -

“No person shall remove, alter, damage, substitute or alienate any goods comprised in the proclamation until they are redeemed by payment in full of the amount in the court warrant or letter of instruction or such lesser amount in the court warrant or letter of instruction or such lesser amount as the creditor or his advocate shall agree in writing.”

It is clear from this rule that attachment is complete on proclamation. It follows that I find that attachment of motor vehicle KVE 001 was completed on 23rd November 2004 since it is a moveable item.

That being my finding it follows that as at 23rd November 2004 the registered owner of the motor vehicle was either Shabbir brothers or Mohamed Afzal and none of these two have brought objection proceedings. The present objector was registered as the owner of the motor vehicle on 24th November 2004. I do accept the 2nd defendant’s argument that it was necessary for the objector to prove the basis of the transfer of the motor vehicle in its name, for example by showing a sale agreement receipt for payment etc. I would also add that it was necessary to show a resolution by the objector to purchase the subject motor vehicle, this would have assisted the court to determine whether the objector had a legal or

equitable interest in the subject motor vehicle.

On the argument on whether or not Pauline Wanjiru Njuguna is a director of PALACE INVESTMENT LTD. Looking at the letter, undated, from the registrar of Companies it clearly states that as per the annual returns of PALACE INVESTMENTS LTD of 2004 the list of directors did not include the said M/s Njuguna. It therefore does seem strange that the objector annexes what is purported to be minutes of Annual General Meeting of 2004 where the said M/s Njuguna is appointed director. The question is why was this information not included in the annual return of 2004. I find that it is highly probable that the said M/s Njuguna was not a director as at end of the year 2004.

Having analysed the evidence and considering the authorities cited by the parties I order as follows: -

(a) That the objector's application dated 21st January 2005 is hereby dismissed with costs to the 2nd defendant and to Dollar auctions.

Dated and delivered at Nairobi this 10th day of April 2005.

MARY KASANGO

JUDGE

Read and delivered at Nairobi by Azangalala J, this 10th day of April 2005.

F AZANGALALA

JUDGE