

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 229 of 2003

KENYA NATIONAL CAPITAL CORPORATION LIMITED PLAINTIFF

VERSUS

INTEGRATED WOOD COMPLEX HOSEA KIPLAGAT.....DEFENDANT

R U L I N G

In this application (chamber summons dated 2nd March, 2005) **SEWENEI LIMITED** (hereinafter called the Objector) seeks the lifting and/or setting aside of the attachment in execution of decree herein of the goods listed in the proclamation dated 8th February, 2005 upon the main ground that the said goods belong to the Objector and not to the Judgment-Debtor. The application is brought under Order 21, Rules 56 and 57 of the Civil Procedure Rules (the Rules). The Objector must therefore prove on balance that it is entitled to or has a legal or equitable interest in the whole or part of the attached goods (see Rule 53(1) of the same Order). Among the attached goods listed in the proclamation are two motor vehicles- a Mercedes Benz saloon KYE 611 and a Mitsubishi Pajero. The other goods are stated to be household items (which have not been specified) inside some two locked premises. Rule 12(b) of the Auctioneers Rules, 1997 requires that the proclamation do indicate the value of the specific items and the condition of each item attached. I therefore consider that these unspecified goods in two locked premises whose values and conditions have not been indicated, have not been duly attached. The registration number of the Mitsubishi Pajero has not been given in the proclamation. Indeed it is the Objector who has provided its registration number in the affidavit sworn in support for the application. Nor is its value indicated. Likewise the value of the Mercedes Benz saloon KYE 611 is not indicated in the proclamation. I thus also consider that the two motor vehicles have not been properly attached for failure to comply with the mandatory requirements of paragraph (b) of Rule 12 of the Auctioneers Rules. But for a proper and complete disposal of the application I will for the moment presume that the two motor vehicles were duly attached.

The Decree-Holder, **KENYA NATIONAL CAPITAL CORPORATION LIMITED**, has opposed the application upon the grounds that the application is without merit and frivolous; that it is an abuse of the court process merely intended to frustrate the Decree-Holder's attempts to obtain the just fruits of its litigation; and that the Objector lacks *locus standi* to make any application with regard to motor vehicle KAM 987V. No replying affidavit was filed.

During arguments it was pointed out by learned counsel for the Decree-Holder that the copy of the registration book of motor vehicle KAM 987V annexed to the supporting affidavit shows that the motor vehicle is not in the name of the Objector but in the name of THE CO-OPERATIVE BANK OF KENYA LIMITED. It was also pointed out that the supporting affidavit is sworn by the 2nd Defendant/Judgment-Debtor, **HOSEA KIPLAGAT**, as a director of the Objector. Regarding motor vehicle KYE 611, which is in the name of the Objector as seen from the copy of the records given by the Commissioner of Motor Vehicles and annexed to the supporting affidavit, it was submitted for the Decree-Holder that the 2nd Defendant/Judgment-Debtor as a director of the Objector has a disposing power over the Objector's property within the meaning of section 44(1) of the Civil Procedure Act, and that therefore this motor vehicle was liable to be attached in execution of decree herein. That subsection provides that all

property belonging to a judgment-debtor, including property over which, or over the profits of which, he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall (subject to certain exceptions) be liable to attachment and sale in execution of a decree. I must say, with respect, that this point is not well-taken. A limited liability company, such as the Objector, has its own legal existence and personality separate from and independent of its directors or shareholders. It has capacity to hold and own property for itself and in its own name. It does not hold such property on behalf of its shareholders or directors. Nor will its directors have disposing power over such property of the company which they may exercise for their own benefit. Where disposing power has been donated by the articles of association surely it must be exercised for the benefit of the company and not for the benefit of the directors. Whereas directors or shareholders may own shares in the company they do not own as such the property of the company. I therefore do not accept that motor vehicle KYE 611, which clearly belongs to the Objector, could be lawfully attached under section 44(1) of the Civil Procedure Act in execution of decree herein on account of the 2nd Defendant/Judgment-Debtor being a director of the Objector.

Regarding motor vehicle KAM 987V, it was submitted for the Objector that the same is in the name of **THE CO-OPERATIVE BANK OF KENYA LIMITED** as legal owner to protect its interest as financier for its purchase, though the Objector is the beneficial owner of the motor vehicle. Inasmuch as the Decree-Holder has not placed before the court any material tending to connect, even remotely, the Judgment-Debtors with this motor vehicle, I will accept the position espoused for the Objector.

I am therefore satisfied that the Objector has proved on balance that it has a legal interest in motor vehicle KYE 611 and an equitable interest in motor vehicle KAM 987V. I would allow the application as prayed with costs to the Objector. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 29TH DAY OF JULY, 2005.