



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Misc Appli 400 of 2001**

**HEZEKIEL OGAO ABUYA**

**T/A ABUYA & COMPANY ADVOCATES.....PLAINTIFF/DECREE  
HOLDER**

**VERSUS**

**KUGURU FOOD COMPLEX.....DEFENDANT/JUDGMENT  
DEBTOR**

**SOFTA BOTTLING COMPANY  
LTD.....OBJECTOR**

**R U L I N G**

The Objector herein, **SOFTA BOTTLING COMPANY LTD.**, applied by chamber summons dated 27.10.2004 under Order 21, Rules 56 and 57 of the Civil Procedure Rules (the Rules) for an order to raise and/or vacate the attachment in execution of decree herein of the goods proclaimed by the auctioneer on 1st October, 2004 upon the main ground that the goods belong to the Objector and not to the Judgment-Debtor, **KUGURU FOOD COMPLEX**. When the application came up for hearing on 17th May, 2005 the Decree-Holder, **HEZEKIAH OGAO ABUYACATERESS MILLING COMPANY LTD ia ABUYA & CO., ADVOCATES**) raised a preliminary objection to the application upon two points of law. One, that the application *is res judicata* on account of a previous application by chamber summons dated 9.7.2003 filed by the same objector together with another objector called **CATERESS MILLING COMPANY LTD** in respect to the same goods following an earlier attachment in execution of the same decree. It is said that the said earlier application was heard and finally determined in a ruling dated 27.8.2004, and that the court held that the goods belonged to the Judgment-Debtor. The second point is that the application is not properly before the court in that it was filed out of time without leave.

In reply it was argued for the Objector that although the same goods had been the subject of the earlier application the issue whether or not the goods belonged to the Judgment-Debtor was never been canvassed or decided, the court having been concerned with a prayer for leave to lodge the objection out of time, and having refused to grant the leave sought. The principle of *res judicata* could therefore not apply. Regarding the submission that the present application had been filed out of time without leave, it was argued for the Objector that notice of objection to attachment was given on 14.10.2004, the Decree-Holder filed his notice of intention to proceed with the execution on 18.10.2004 which was served upon the Objector the same day and that the present application was filed on 27.10.2004, within the ten(10) days allowed by Rule 56 of Order 21. Therefore, the application was not filed out of time.

I have considered the submissions of the learned counsels appearing. I have also perused the court record, including the ruling of Hon. Kasango, Ag. J (as she then was) dated and delivered on 27th August, 2004. In that ruling the judge considered two applications – one dated 9th (and filed on 10th) July, 2003 for extension of time under Rule 5 of Order 49 of the Rules to enable the applicants therein (who included the present Objector) to file an objection to attachment out of time. The second application was dated 8th April, 2004 and sought an order under Order 20, Rule 11(1) of the Rules for the Judgment-Debtor to liquidate the decretal sum by installments. Both applications had been canvassed *inter partes*. The Judge dismissed both with costs. In the course of her ruling she observed that there were transfers (of properties) effected from the Judgment-Debtor to the Objector and that there was no evidence that such transfers were for value, and that therefore she was inclined to accept the Decree-Holder's argument that such transfers were attempts to defeat the Decree-Holder's claim. But this can hardly be construed to be a final

determination that the attached goods belonged to the Judgment Debtor and not to the Objector for the simple reason that the application before Hon. Kasango, was not an objection to attachment but an application for leave to lodge objection out of time. The substantial issue before the court was thus whether leave as sought should be granted, not whether the attached goods belonged to the Objector or the Judgment-Debtor.

I therefore hold that the above issue was not directly and substantially in issue in the chamber summons dated 9.7.2005 or that the issue was heard and finally decided in the aforesaid ruling of 27th August, 2004. The present application is therefore not res judicata.

Regarding the issue whether or not the present application was filed out of time, the record of the court bears out the Objector's position that the application was filed within ten (10) days of service upon the Objector of the Decree-Holder's notice of intention to proceed with the attachment as required by Rule 56 of Order 21. There is thus no merit in this ground of objection.

In the event the preliminary objection is overruled with costs to the Objector. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 22ND DAY OF JULY, 2005.**