



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

Civil Case 241 of 2002

ROT MEI LTD.....
PLAINTIFF

VERSUS

INTERSTATE 2000 LIMITED SULEIMAN MBARUK T/A TAWFIQ BUS SERVICE...2ND
DEFENDANT

AND

FALCON COACH LIMITED.....
.....OBJECTOR

RULING

This court is called upon to rule on four applications, filed by objectors all dated 16th December 2004.

The applications are brought under Order L Rule 1, Order XXI Rule 41 of the Civil Procedure Rules; sections 3, 3A, 4, 63 (e) and 89 of the Civil Procedure Act.

For ease, I shall deal with each application separately.

Objector, **AL KHALEEJ TRANSPORTERS LIMITED** application seeks orders that:

“The Honourable court be pleased to order the immediate release of motor vehicles registration numbers KAN 918b (Scania), KAN 219V (Scania), KAN 084 (Scania), KAN 218V (Scania) and KAN 962K (Scania) and trailers registration numbers 2B 8949, ZB 9423 and ZB 8932 each and all belonging to AL Khaleej Transporters Limited, the Objector/applicant herein and attached by M/s Mwara investments Limited, auctioneers.”

The affidavit in support states that the attachment by M/s Mwara Investment Limited, took place on 12th July 2004. An application was filed by this objector on 13th July 2004 seeking the release of the attached goods. The ruling of this court delivered by the Hon Justice Azangalala, on 17th September 2004, ordered the decree holder to release the said vehicles, save for vehicle TZM 6295 which the judge

found belonged to the judgment debtor. Despite that finding, the objector has sought by this present application that the said vehicle, TZM 6295 be released. The objector's affidavit, without being specific stated that the auctioneer attached other vehicles after the objector filed the application of 13th July 2004. The objector failed to identify which vehicles were attached after the application was filed. Even if the vehicles were attached after the application was filed that application not argued until 30th August 2004. The objector was obligated to be specific on when the said attachment occurred and as to which vehicles were attached. It was not right for the objector to generalize the issue, because if indeed the attachment was before the filing of the application, dated 13th July 2004, or before its argument on 30th August the objector should have included those vehicle in that application. To have failed to have done so renders the application res judicata. The law does not allow a party to prosecute a matter in piece meal. The fact that this objector has failed to 'come out' clearly on when the subsequent attachment took place and the vehicle affected by that attachment can only lead this court to interpret and infer that silence against the objector, and to assume that the present application is caught by the rule of res judicata. That indeed is the finding of the court that the application dated 16th December 2004, filed by **Al Kaleej Transporters Limited** fails for being res judicata.

The objector, **Falcon Coach Limited** seeks the following order:

“The Honourable court be pleased to order the immediate release of motor vehicles registration number KAM 758M (Nissan) KAM 432X (Nissan) and KAM 672 Q (Nissan) each and all belonging to Falcon Coach Limited, the objector/applicant herein, and attached by M/s Mwara Investment Limited, auctioneers.”

Falcon Coach Ltd filed a notice of objection, under OXXI Rule 53 (1) of the Civil Procedure Rules. The decree holder filed a notice of intention to proceed on 5th August 2004 which notice was served on the objector on 9th August 2004. The objector having received that intimation from the decree holder, ought, as provided by Order 21 Rule 56, to have filed an application to establish its claim within 10 days, of service of such intimation. The objector did not file its application within that period but instead filed this present application on 16th December 2004. Having failed to file that application within that prescribed period the objector's only other option, was to seek an enlargement of the period of filing. This present application having been filed without the enlargement, of that period, the objector's application is misconceived and must fail. This finding finds support in a finding made by the Hon Justice Mwera, in HCCC 1444 OF 1999 DIAMOND TRUST BANK (K) LTD – VERSUS – DAVID MWAINA MIMANO (unreported). The judge found that:

“.....what rule 56 requires is that the objector should in 10 days file proceedings to establish his claim.”

The objector, **SAID SLEYYUM**, prays for the following orders:

“* The Honourable court be pleased to quash or set aside a purported authority given to M/s Mwara Investment Limited Auctioneers, to break into the premises of Al-Khaleej Transporters Limited in order to execute the Decree herein by the Chief Magistrate's Court Milimani Commercial Courts Nairobi.

· **The Honourable court be pleased to order the immediate**

Release of trailer registration number IR 74459 Mercedes Benz, belonging to Said Sleyyum the objector/applicant herein attached by the auctioneer.”

The order which the objector seeks to have quashed was issued on 29th June 2004. The attachment that followed the order, for breaking, was executed on 12th July 2004. The application in seeking an order of this court, to quash the Chief Magistrate's court order, is misconceived because that order has already been executed. To grant an order to quash another order, which has already been executed, is to grant an order in vain. This court refused to grant such an order.

The objector, through his counsel filed a notice of objection to attachment on 17th September 2004. The decree holder filed an intimation to proceed with the attachment, and served the same on the objector's counsel on 22nd September 2004. The objector then filed the application to establish his claim; by the present application dated 16th December 2004. That application breached the 10 days rule of Order 21 Rule 56. That application fails for that reason as outlined herein before.

The objector **Tawfiq Bus Services Limited**, Tanzania, also seeks an order to quash the chief Magistrate's Order of 29th June 2004, which order was executed on 12th July 2004, and the court cannot quash, that which has already been executed. The objector further seeks release of motor vehicle TZM 6295, Mercedes Benz. A finding of fact was made in this matter by the Hon Justice Azangalala, that that vehicle is owned by the defendant judgment debtor. In the absence of an appeal, or review, the prayer sought by the objector cannot succeed. Additionally this application also offends order 21 rule 56 for having not been filed within the 10 days rule.

The end result of the find of this court, as herein before stated, is as follows: -

(1) That the applications filed by Tawfiq Bus Services Limited Tanzania, said Sleyyum, Falcon Coach Limited and Al Khaleej Transporters Limited, the objectors herein, all dated 16th December 2004, are dismissed and costs are awarded to the plaintiff as against each objector hereof.

Dated and delivered this 17th November 2005.

MARY KASANGO

JUDGE