

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 158 OF 1999**

ANNE WAMAITHA IRUNGU

WILLY WAIRE IRUNGU..... PLAINTIFFS

VERSUS

ESTHER MWIKALI

ABDUL HAKIMDEFENDANTS

R U L I N G

The application for hearing was the one dated 13.4.2004 brought pursuant to Order 21 Rule 56 and 5 (1) (2) (3) of the Civil Procedure Rules and Section 3A Civil Procedure Act. It is filed by the objector applicant who prays that the attachment by Makuri Auctioneers made on 8.10.2004 be lifted. The grounds relied upon are that the objection notice was served on the attaching creditors on 15.1.2004 who have failed to intimate to the objector whether or not they intend to proceed with execution of the attached goods within 15 days. The application is also supported by the affidavit of Veronica Maweu Advocate for the objector who reiterates the grounds. She annexed the objection notice and order of stay of execution from the court which is issued on same day. The application was opposed and Mr. Makau counsel for plaintiff/respondent who does accept having received notice of objection issued on 15.1/04 but denies that the court ever issued notices to the attaching creditor (plaintiff) and the objector asking the attaching creditor whether he wanted to proceed with the attachment wholly or in part as provided by Order 21 Rule 54 and that though the court did not serve the plaintiff's counsel, the counsel went ahead to intimate to the court in their letter of 5.2.2004, that they would proceed with attachment. The said notice was served by registered post. It is the submission of Mr. Makau that the application was premature because the court had not issued the relevant notices in compliance with order 21 Rule 54 and that the Decree Holder was only served with objection and order of stay.

I have considered the submissions by both counsels, the affidavits filed and the court record before me. It is apparent that indeed an objection was lodged on 15.1.2004 by the objector and the court issued notice of stay of execution on the same day. As rightly pointed out by Mr. Makau for the attaching creditor, the said notice of objection did not contain the objector's address as required by Order 21 Rule 53 (2). It is only the counsels address that is contained therein.

The attaching creditor also denies that the court ever complied with Rule 54 by calling on the attaching creditor by notice in writing within 15 days to intimate to the court and the objection in writing whether he intends to proceed with the attachment or the execution wholly or in part. There is indeed no evidence on record to show that the court ever issued this notice to the respondent and objector. There being no such notice the respondent acted out of his own volition when he sent his notice dated 5.2.2004 of intention to proceed, to the objector and court. It can not be said to have been sent out of time because the respondent did not have the required notice from the court and the respondent really had no obligation to send the notice.

Having had no address of the objector, I believe the only address available was that of counsel which was used by attaching creditor. Respondent can not be faulted for doing that. If there is any mix up, it was occasioned by the court and no blame can be laid on the respondent. For that reason the orders sought for lifting the attachment cannot be granted.

The respondent submitted that the application is incompetent because it was brought under the wrong provisions of law in that the applicant cited Order 21 Rules 56 and 57. An application for raising of an order of attachment should have been brought under Order 21 Rule 55. The court had the substance of the application before it and the application would not have been defeated by mere fact of counsel citing the wrong provisions of law. The court will in such a case look at the substance other than the form.

All this considered the court finds that the application is unmerited as the respondent cannot be faulted for what has happened. Let applicant give their address as required and the court issue the notices as required by Order 21 Rule 54 to enable the parties proceed as required. If the parties do not want to wait that long, let the objector go ahead to file their application following the respondents intimation that they will proceed with the attachment wholly. Application is hereby dismissed with costs

Dated, read and delivered at Machakos this 5th day of October 2004.

R. V. WENDOH

JUDGE