



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ANAIROBI
CIVIL CASE NO. 16 OF 1998

BENSON MBUCHU GICHUKI PLAINTIFF

VERSUS

EVANSON KAMONDE MUNJUA..... DEFENDANT

JAMES KUNGU DEFENDANT

RULING

The matter under consideration is a Notice of Motion dated 1. 2. 2001 which was taken out by one *Francis Gitau Njuguna a (Njuguna)*. Njuguna is a Licenced Auctioneer trading under the name of Femfa Traders. He was instructed by this Court to execute some warrants of attachment against two Judgment Debtors *Evanson Kamonde Munjua* (Munjua) and *James Mbuti Kungu* (Kungu) for recovery for some Shs.602,950/= outstanding in a Decree issued in favour of the Decree holder *Benson Mbuchu Gichuki* (Gichuki). The warrants which are exhibited with the Application were issued on 3. 2. 2000 and were executed on 9. 2. 2000. Njuguna attached several vehicles and other moveable assets listed in two inventory schedules dated the same day. Njuguna then says he was subsequently served with orders for stay of execution following several objections against the attachment by other parties. Those orders are not exhibited with the application. The he refers to a complaint lodged before the Auctioneers Licensing Board by Gichuki against him in October 2000 that he had accepted payments from Judgment debtors by installments, a conduct which was found disgraceful and he was reprimanded. Other complaints he referred to having been made and acts of harassment and pressure brought to bear on him by Gichuki, were not exhibited with the application although they were referred to in his Affidavit. Then he swears that he returned the warrants to Court although he still remained with the attached properties which he continued to keep in storage at a cost he wishes the Court to assign responsibility for.

It is a fairly baffling application which invokes Order 21 rule 55 Civil Procedure Rules. The Rule provides:

“Should the attaching creditor in pursuance of a notice issued under rule 54 either fail to reply to the Court and the objector within the period prescribed by the notice or intimate in writing to the court and the objector within the period prescribed by such notice that he does not propose to proceed with the execution of the attachment of the whole or of portion of the property subject to the attachment, the court shall make an order raising the attachment in accordance with the intimation received from the attaching creditor and shall make such order as to costs as it shall deem fit.”

The Rule is a logical follow up of Rules 53 and 54 which provide for objections to attachments by the giving of written notice; and an order for stay of further execution being issued by the Court upon receipt of a valid Notice of objection. The Decree holder is then required to intimate whether he proposes to proceed with the attachment wholly or in part. Rule 55 then provides for the raising of the attachment if

the Decree holder either says he is not proceeding or fails to give an intimation within 15 days.

As stated above it is not clear from the Affidavit in support of the application what objections were made to the attachment made on 9. 2. 2000 and what orders for stay were issued pursuant thereto. It is also not clear what attached properties Njuguna sold that were not subject to objections or when he returned the warrants issued on 3. 2. 2000 either upon expiry or execution. Although the inventories referred are not clearly legible they indicate an attachment of various moveable properties from both Judgment-Debtors.

The submissions of Learned Counsel Mr. Wamalwa for Njuguna did not take the matter any further. He simply said there was an attachment of "Certain properties on 9. 2. 2000." Subsequently objections were filed and a stay was issued on 3. 4. 2000. But the Decree holder did not intimate that he would proceed with the attachment. Hence the attachment stayed in Limbo. That is why the Auctioneer was seeking the directions of the Court on what to do with the attached property and the costs incurred in storage charges.

The submissions of the other two parties in the saga did to help matters either. Gichuki the Decree holder simply said the matter should be submitted to Arbitration. His Affidavit in reply sworn on 2. 3. 2001 referred to agreements marked BMG I and BMG II. There were also Arbitral proceedings marked BMG III – VIII. All those exhibits however, were not part of the Affidavit as they are not on record! The Affidavit appears irrelevant at any rate since the case has nothing to do with Arbitration. Learned Counsel Mr. Moraa for the Objector on the other hand referred to an agreement with the Auctioneers for release of "the Motor Vehicle." The Objector however refused to pay the costs of the attachment since it was the Decree holder, Gichuki, who did not intimate whether he wished to proceed with the attachment.

That being the only semblance of assistance available from the parties, I took time to peruse the record from the time the warrants of attachment dated 3. 2. 2000 were issued to the Applicant for execution. They were returnable on 3 4. 2000. The record shows:

- 1). That a Notice of Objection to the attachment made on 9. 2. 2000 was filed by one Leah Wanjiku Munjua on 31. 3. 2000 on Motor Vehicle Toyota Corolla E80 Registration KXC 573 under Rule 53.**
- 2). A stay Order was issued to Njuguna on 3. 4. 2000 under Rule 54.**
- 3). A notice was issued to Mr. Gichuki under Rule 54 to intimate whether he wished to proceed with the attachment of the said motor vehicle within 15 days from 3. 4. 2000.**

The period of 15 days was expiring on 18. 4. 2000 but there is no intimation on record by the Decree holder that he would proceed with that attachment. Under Rule 55 therefore the attachment was raised but it is not clear whether the vehicle subject to the objection was released. It is also not clear whether it is one for the properties the subject matter of the Application under consideration.

As stated earlier the warrants were returnable on 3. 4. 2000 in respect of the attached items that were not the subject matter of any objections. I see nothing on record to show that they were returned or extended.

It would appear however that on 16. 5. 2000 another attachment was levied and a Mitsubishi Pickup Registration KAC 650B was attached. Another motor vehicle KAH 662Z a Mazda Familia was also attached on the same day. There was again an attachment on 5. 7. 2000 where motor vehicle Registration AE228AHR Peugeot 405 Saloon was proclaimed. On all three occasions objectors filed Notices on 23. 5. 2000, 23. 5. 2000 and 7. 7. 2000 respectively. Requisite Notices and orders for stay were also issued on 25. 5. 2000, 25. 5. 2000 and 7. 7. 2000 respectively. There was no intimation that the decree holder would proceed with the attachments and therefore, assuming that the attachment warrants were lawful in the first place, the attachments would have been automatically raised under Rule 55 of Order 21. I say assuming the warrants were lawful because I cannot see on record when the warrants dated 3. 2. 2000 expiring on 3

4. 2000 were extended. The only letter on record for extension was written on 17. 5. 2000, one day after the attachments made on 16. 5. 2000.

With respect the application made in this matter is not only confusing but misleading. The Applicant has chosen to give selective and inadequate information as the basis for the application. I think he is less than candid. The Court's discretion cannot be sought or granted on the basis of such information. Equity would frown on it.

I dismiss the application. The other parties were equally unhelpful, and I therefore order that each party shall bear its own costs of the application.

Dated this 14th day of February 2003.

P. N. WAKI

JUDGE

Delivered this 4th day of March, 2003.