



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 800 OF 1997

C. M. C. MOTOR GROUP..... PLAINTIFF

VERSUS

GAREX KENYA LTD & ANOR..... DEFENDANT

RULING

This ruling concerns two applications dated 26th July 1999 and 4th October, 1999 respectively brought by Diamond Trust of Kenya Ltd (1st objector) and Ramco Industrial Credit Ltd (2nd objector). Both applications are under OXXI Rules 53 - 58 of the Civil Procedure Rules.

The immediate History leading to the filing of the applications may be briefly told:- The plaintiff CMC Motors Group Ltd obtained a consent Judgment against the 1st and 2nd defendants on the 19th January, 1999. It was for shs 3,134,975/- with interest and costs.

The counterclaim of the 1st defendant against the plaintiff was in the same consent ordered to be tried in the normal way. The decree holder, an application, was on 2nd June 1999 issued with warrants of attachment and sale which were addressed to the Court Brokers firm of Virmir Auctioneers and which commanded the said auctioneer to attach and sell the Judgment debtors moveable property to satisfy the decree holders decree for money.

The auctioneer , Patrick Nganga Mburu has testified in these proceedings. He stated that after he received the Warrants he went to the judgment debtors Eastliegh Offices and took an inventory of three Scania Buses, bearing registration numbers KAJ 197E, KAJ 947W and KAC 424 J. He later attached these motor vehicles after giving the statutory 7 days notice to the judgment debtor. On 2nd of July 1999 he advertised the motor vehicles for sale, to take place on 9.7.99 but only sold two buses as he was served with an order of the court staying execution with regard to motor vehicle registration number KAJ 197E I will return to Mr. Mburu's evidence later in this ruling.

After the attachment, however, the 1st objector filed a notice of objection to attachment on 8.7.99 and obtained an order of stay of execution on the same date. It seems to be common ground that this order of stay was served on the auctioneer on 8.7.1999 and on the advocate for the Decree Holder at 12.45 on 9.7.99 about one and a quarter hours after the sale was to have taken place. Nothing turns on this point as the auctioneer, in obedience to the court order staying execution did not sell the first objectors bus namely KAJ 197E.

On 26th 1999 and after the decree holder intimated its intention to proceed with the sale of this particular motor vehicle, the objector filed an application seeking that it be released. The application was

grounded as the affidavit of Nassim Devji and three other grounds that were stated on the body of the application, namely

- a. The objector is the owner of the subject motor vehicle by virtue of a hire purchase agreement between the objector and the 1st defendant judgment debtor dated 24th June 1997 under which the 1st defendant hired the said motor vehicle on the terms and conditions particulars in the said agreement.
- b. The first defendant / Judgment debtor has not paid in full hire purchase price of the subject motor vehicle and the property in the vehicle therefore vests in the objector. and
- c. The objector a financier is registered as owner of the subject vehicle jointly with the first defendant/Judgment Debtor.

It is the objectors case that the existence of a hire purchase agreement between the objector and the 1st defendant renders the Motor vehicle unavailable for attachment by virtue of clause 4(g) of the agreement which provides as under

“if the hirer shall suffer any step to be taken or threatened to be taken by levy a distress or executor upon the motor vehicle the owners shall be entitled to retake possession of the goods...”

It is the objectors further stand that since the motor vehicle is in the joint names of the judgment debtor and itself then by virtue of the provisions of Order 21 Rule 42 of the Rules the motor vehicle is not available for attachment by way of seizure but can only be the subject of notice. That rule provides as under:-

“Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co - owner, the attachment shall be made by a notice to the judgment debtor prohibiting him from transferring the share or interest or charging it in any way”

The objector relies on the case of Darban and S/S Fatin and Another 1967 EACA S26 and the High Court decision in the same case reported in 1964 EA 665.

The defendant - judgment debtor, in opposing the application firstly attacks the affidavit on which the application is grounded. He says it is defective and should be struck out. This affidavit, sworn by Mrs Nassim Devji pleads at paragraph 14 that what she deponed is true to the best of her knowledge, information and belief. The decree holder position is that since the affidavit.

“did not set out the deponents means of knowledge or her grounds of belief regarding the matters stated on information and belief, and secondly it did not distinguish between matters stated on information and belief and matters deposed to from the deponents knowledge.....”

Then on the authority of Assanads and Sons Ltd 1959 EACA 562 and standard Goods Cooperation LTD versus Harakhchand Nathu & Co., (1950) 17 EACA 99, the “court should not act on an affidavit so drawn”.

I have considered this submission and the law as stated by these two authorities. Mrs Nassims affidavit depones to several facts including the existence of a hire purchase agreement, the existence of letters concerning installments payable pursuant to the agreement, the arrears owing; and the implied joint ownership of the motor vehicle under review. The affidavit as drawn lumps together depositions that under paragraph 14 are true to the best of her knowledge; those that are on information and those that are on belief. It does not distinguish which of those matters fall where.

It is a defective affidavit and with respect to Mr. Wanjohi for the objector it does not all within the

remedial provisions of Order 18 Rule 7 which concern affidavits that contain defects of misdescription of parties, title or irregularities of form. The authorities above do not allow me to rely on this affidavit. As it is on this affidavit, that the application is predicated, and as the affidavit has fallen to the ground, the application must similarly fall to the ground. This is said regally as the objectors other grounds under the Hire purchase Act and under Order XXI Rule 42 commend themselves as meritorious. The result however is that the application dated 26th July, 1999 is dismissed with costs to the decree holder.

The 2nd objectors application was filed on 4th October 1999 under certificate of urgency and in its amended form sought an order that motor vehicle registration number KAJ 949W be released to it.

I have already referred to the evidence of the auctioneer, concerning the manner in which he attached those motor vehicles. he has stated that he sold the motor vehicle claimed to belong to the 2nd objector on 9th July 1999 at 11.30 a.m.

There appears to be no dispute on this aspect of the matter. the 2nd defendants application is supported by an affidavit sworn by Kamal Shah, sworn on 5th August 1999, a supplementary affidavit by the said Kamal Shah sworn on 4th November 1999 and the grounds contained in the application in its original and amended form. In short words, the objectors case is that the objector and the defendant/judgment debtor entered into a Hire Purchase Agreement concerning this motor vehicle on 10th December 1997; the Hire Purchase agreement was duly registered on 8th January, 1988 by the registration of agreements, that the motor vehicle is registered in the joint names of the objector as financiers and the defendant as hirer; that the defendant is in arrears to the tune of 6 million odd shillings and that the objector company is a stranger to any dealing between the decree holder and the defendant/judgment debtor.

The objectors relies, as did the 1st objector before him, on the provisions of order XXI Rule 42 of the Rules and the provisions of the agreement particularly paragraph 4(g) which prohibits sale of a property under a Hire Purchase Agreement where the hirer has not paid in full the hire purchase price and exercised the option to purchase.

The decree holders answer to the objectors case is that the decree holder had a lien over the bus an account of the cost of repairing the bus by the Decree holder that when the decree holder repaired the motor vehicle he had no notice or objection that the judgment debtor was other than the owner of the motor vehicle; The Decree holder seeks a declaration that the repairer of a watch or motor vehicle is entitled to hold such watch on motor vehicle until he is paid for services rendered.

His other defence is that the Notice of Motion was filed on 19.7.99; the motor vehicle it is submitted was sold on 9.7.99 and the court therefore cannot issue an order in vain; that what the objector is doing amounts to closing the stable after the horse has taken off.

The decree holder also submitted that there was collusion between the objector and the judgment debtor; that it is mandatory under Rule 57(2) of order XXI that the judgment debtor be served (which was not done in this case. From the submissions and the evidence, there's no dispute that the motor vehicle was sold on 9th July 1999 and this application filed on 19.7.99, ten days after the event.

The sale itself is however shrouded in mystery. the auctioneer states in evidence that he sold the subject bus for shs 600,000/= but received a deposit of shs 300,000/= only which he paid to the decree holders advocate. this action was irregular and contrary to the law governing the operations of auctioneers .

Auctioneers are at the pain of penal sanctions enjoined by Rule 28 of the Auctioneers Rules to deposit all proceeds of sale with the court within 7 days of sale. The need for this rule will become clear in the course of this ruling. the auctioneer here does not appear to have complied with this rule. Instead, he paid the proceeds of sale, or such part as he was paid immediately to the decree holders advocate. he then rather strangely and in my view illegally passed on the balance of the sale to the decree holders advocate whom we are told was to get the shs 300,000/= payable to complete the sale.

In the event there is no evidence whatsoever that this balance was ever paid. The sake therefore

cannot, in my judgment be said to have been completed. Because of the auctioneers failure to obey the commands of Rule 28 of the Auctioneers Rules and his failure to furnish the court with a detailed account of the proceeds of sale and how they were disbursed, the court is left in the dark and the judgment debtor who was entitled to such information also left in the dark.

As a result of that omission too the provisions of OXXI Rule 53(1) as amended by L.N. No. 5 of 1996 could not avail the objector. That sub rule provides that an objector may at anytime

“Prior to payment out of court of the proceeds of such sale give notice in writing to the court and to the decree holder of his objection.”

Theres no telling whether, if the auctioneer had not acted the way he did, the proceeds of sale would not have been in court when the application was made. I do not think it would be equitable to allow the decree holder to benefit from his misdeeds.

I am not satisfied, as the facts that the vehicle reg. No, KAJ 947W has been sold. It is in my judgment available to abide any order of this court.

There is no dispute that the motor vehicle was jointly owned by the judgment debtor as hirer and the 2nd objector as financier. The interest of the judgment debtor was therefore, under OXXI Rule 42 of the Rules only available for attachment by way of Notice prohibiting alienation of the motor vehicle to third parties.

I do not believe a decree holder should exercise its rights of a lien holder by attaching such a motor vehicle through a completely different court process and in any event, such right of a lien holder would have to be confined to the interest of the judgment debtor which would again be subject to the provisions of Rule 42 of Order XXI aforesaid.

The motor vehicle, it is common ground, was under a Hire Purchase agreement between the objector and the decree holder. The hirer’s interest in such a situation has been held as not being attachable in the case of Daibai versus Fatin and Ano 1967 EA 526. I apply this reasoning and the holding in the case and hold that the hirers interest in motor vehicle registration no. KAJ 947 W was not available for attachment by any third parties.

I have not been satisfied that the judgment debtor and the objector have, in this matter colluded to defeat the decree holder’s right as a lien holder.

In the totality of all the material before me, I find and accordingly so hold, that the 2nd objectors application is valid and should be allowed.

Costs of the application to the 2nd objector.

C. K. Njai

Principal Deputy Registrar

19.2..2001

Court: Ruling delivered.

Mr. Wanjohi for the 1st objector

M. Mwicigi for the 2nd objector

No appearance for the judgment debtor as the decree holder

C.K. Njai

Principal Deputy Registrar

19.2.2000

Court: Certified copies of Ruling and proceedings to be typed and availed to the parties against payment

C.K. Njai

Principal Deputy Registrar

Court: Leave to appeal, if necessary is granted

C.K. Njai

Principal Deputy Registrar

19.2.2001

Court: Any party, so minded, may make a formal application for stay of execution

C.K. Njai

Principal Deputy Registrar

u19.2.2001