



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 6482 OF 1992

JOSEPH STASIRA MUTENDE PLAINTIFF

VERSUS

MORRIS ODHOKA & TWO OTHERS DEFENDANTS

R U L I N G

This application dated 12th February, 2001 seeks this courts' order to lift and/or set aside the attachment effected on the objectors property by Dollar Auctioneers on 25th January, 2001 and/or to make such other or further orders as the court deems necessary. There was also a prayer for costs of the suit.

The application is based on the grounds that the attached goods belonged to the objector and not to the defendants; that the objector was not a party to the suit; that the goods were attached pursuant to an alleged judgement of the court obtained by the plaintiff against the second defendant and that the objector stood to suffer irreparable loss if the attachment was allowed to proceed.

It was also supported by an affidavit deponed to by the objector Samuel Mwaura Kibunja Felix Kariuki. Its effect is to confirm to the court that the proclaimed goods belong to the objector and not to the second defendant against whom judgement had been passed, hence not liable to proclamation or attachment.

There was no replying affidavit but in court on 23rd May, 2001 counsel for both parties appeared and either urged or opposed and either urged or opposed the application.

Counsel for the objectors reiterated that the objector had no knowledge of the case subject to the proclamation and that no notice of judgement was served upon him.

Copies of log books of motor vehicle registration numbers KAK 404 M and KAB 253 L which bear the name of Samwel Mwaura Kariuki and/or Samwel M.F Kariuki to confirm that these vehicles are his and not those of the second defendant.

Counsel for the respondent opposed the application and stated that it was the defendant who took out third party proceeding to bring in 2 thick parties one of whom owns motor vehicle registration number KAB 253 L.

That in the defence filed by third parties, ownership of motor vehicle registration No. KAB 253 L was not contested and that on 1st December, 1999 a consent judgement was entered by and between the parties on liability hence ownership of the motor vehicle was concluded.

That the objector has not denied that this particular motor vehicle was involved in the accident subject to the case which gave rise to attachment proceedings. Counsel submitted that if the applicant is very

keen about other attached property, the respondent would not mind proceeding with attachment of motor vehicle KAB 253 L.

In the suit subject to the decision giving rise to the attachment proceedings, motor vehicle number KAB 253 L is mentioned as one of the vehicles which collided, thus causing injuries to the plaintiff Joseph Siabira Mutende.

The third parties defence filed herein on 12th September, 1997, there was a specific averment acknowledging that the above motor vehicle was involved in the accident subject to this case. And in the consent judgement recorded by the parties the plaintiff was awarded Kshs.285,900/= against the defendant and the third parties and that the third parties' liability was agreed at 90%; or Kshs.257,310/= of the sum awarded.

The defendant was described in the plaint as the driver of motor vehicle registration number KYQ 886 and in his defence blamed the owner or driver of motor vehicle Registration number KAB 253 L for the accident.

And in the third party proceedings, the owner of the motor vehicle registration number KAB 253 L is the intended 1st third party described as Kibuya Hardware Limited while the said intended third party was the driver of this motor vehicle.

When motor vehicle registration number KAB 253 L was introduced into the suit by the defendant, the third parties did not actually deny its involvement in the accident and this is why there was the consent judgement recorded on 17th February, 2000.

Given this background, it is not easy for this court to be convinced that the objector, whose motor vehicle was involved in an accident on 10th August, 1992, would be unaware of the goings on until the date of the attachment subject to this application.

Even if it was his insurance company handling the matter surely it must consult with the owner of the motor vehicle as to what must have happened to cause the accident before filing its papers in court or sending an advocate to court to represent it.

That the motor vehicle is registered in the name of the objector does not absolve him from blame so far as the attachment of the motor vehicle is concerned and my view is that the objector is in this court to use technicalities to avoid his liability in this matter.

In fact when he comes to this court and admits to be trading under the name and style of Kibunja Hardware Enterprises without confirming the existence of Kibuya Hardware Limited by evidence, then he is not assisting this court to assist him.

After all this objection case is his and he has the burden of establishing the same on a balance of probabilities.

He has dismally failed to do so and I find no merit in his objection as regards motor vehicle registration number KAB 253 L which the plaintiff – respondent opted to go for in counsel's submission. To this extend I dismiss this objection, otherwise lift attachment on any other goods proclaimed in this case. ½ costs of the application are awarded to the respondent.

Delivered and dated this 5th day of June, 2001.

D.K.S AGANYANYA

JUDGE