

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Civil Case No. 1682 Of 2000

Chris Osenya APPELLANTS

VERSUS

Francis Agumba..... RESPONDENT

RULING

December 15, 2000 T Mbaluto, Judge delivered the following ruling.

By this application, the applicant who is the plaintiff in the suit seeks an order to restrain the defendant from attaching, selling, alienating or disposing of certain goods specified in a schedule annexed to an affidavit he swore on September 19, 2000 in support of the application. Only one ground is urged in support of the application. It is that though the applicant borrowed some Kshs 500,000 from the defendant, the intended attachment of his goods is unlawful in that there is no instrument under which the defendant could properly exercise such powers, there being no registered chattels mortgage over the goods. In response to the applicant's contention, the defendant/respondent says that there is a binding agreement between the two parties and presumably he is entitled to attach and sell the property under the agreement.

The agreement which gives rise to this dispute was signed by both parties on May 12, 2000. By virtue thereof, the respondent agreed to lent the applicant the sum of Kshs 500,000 with interest agreed at Kshs 100,000 to be repaid in two months from the date of the agreement. The crucial clause of the agreement provided:-

“The items in the container and more particularly set out in the schedule hereto shall operate as security for the sums advanced so that the borrower shall not sell, part with possession of the said items and more particularly the motor vehicle and the photocopiers particulars whereof are more specified in the schedule hereto without consent or approval of the lender and that the lender shall any time when there is default in payment or the borrower shall do or cause to be done any act or omission which will injure, waste or diminish the value of the security herein seize and sell the said items.”

It is on the basis of the above clause that the respondent proceeded to attach the applicant's property.

In order to determine whether or not the applicant has established a case for the grant of an interlocutory injunction, I have to determine whether in law the above clause creates a charge in favour of the respondent on the basis of which the respondent can attach the property in question.

In my view, clause does not make the agreement an instrument within the meaning of the Chattels

Transfer Act; nor does it give the respondent any powers to either attach the properties in question. The properties in question were not even in the applicant's possession and consequently he could not claim any lieu over them. The power to attach and/or to sell can only be conferred by agreement or by law. None exists in this case. Indeed apart from the possible right to sue on the agreement, the document does not confer any proprietary rights over the properties whatsoever upon the respondent.

I observe that the applicant alleges that the respondent has not come to court with clean hands and that material facts have not been disclosed but those alleged misdeeds pale into insignificance when compared with the respondent's threat to illegally dispossess the applicant of his properties without any colour of right.

In my view, Order XXXIX was made for the purpose of protecting an owner of a property from exactly the type of illegal action which the respondent threatens. I am therefore satisfied that the requirements for the grant of an injunction particularly that relating to the establishment of a prima facie case have been satisfied. Accordingly, I allow the application as prayed with costs.