



Odhiambo v Omole (Civil Case E001 of 2020) [2024] KEHC 6047 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E001 OF 2020
DO OGEMBO, J
MAY 23, 2024**

BETWEEN

HON. ELISHA OCHIENG ODHIAMBO PLAINTIFF

AND

BODKER NGESA OMOLE DEFENDANT

RULING

1. The two objectors, Samwel Michael Eyinda and Maureen Onyango Odhiambo have applied to this court by way of a Notice of Motion application dated 23/6/2023 seeking the following orders:-

“ A permanent order of injunction be issued restraining the 1st and 2nd Respondent by herself, her agents and legal assigns from selling in an auction on otherwise, to recover the decretal sum in High Court Civil Case No. E001 of 2020, the items listed in the proclamation notice dated 23/5/2023.”
2. Prayer 1 of the application which seeks an order of injunction pending the hearing and determination of this application is spent and not relevant at this state. In support of the application, the 1st objector/ applicant has annexed an Affidavit deponing that he is the registered owner of motor vehicle xxxx, having purchased same from the judgment debtor on 1/8/2020 and therefore is opposed to the vehicle being attached to settle civil debts that he has nothing to do with. He has annexed a copy of the said motor vehicle log book showing his name as the registered owner.
3. The 2nd objector/applicant has similar objected to the intended attachment and sale. She has filed an affidavit in which she depones that she is the owner of the premises at Sodowe Estate, Syokimau where the proclamation was carried out. That the judgment debtor and herself were previously in a relationship but he proclaimed property are hers. He attached receipts to confirm that she purchased the sofa set, dining table, Tv set, micro wave, burner, cooker set, gas cylinder and water dispenser, all from Odds and Ends Ltd.



4. The decree holder, Hon. Elisha Odhiambo, on the other hand, has filed an affidavit sworn on 5/7/2023 to oppose the application. The decree holder depones therein that he personally knows the first objector as one of the judgment debtor's best friend, while the 2nd objector is the judgment debtor's first wife who resides in the judgment debtor's Syokimau home. And that on his personal knowledge the objector cannot personally afford the proclaimed items as they fully depend on the judgment debtor. He challenges the objector's to show specific proof of the purchases of the house and car. That it is clear the judgment debtor transferred the property only after judgment was delivered herein only to defend the course of justice.
5. He went further, that the judgment debtor, who is his neighbour in Kileleshwa uses the same vehicle as late as in June 2023. He has attached photos of the judgment debtor using the said vehicle well after the purported sale. That in any case, the 1st objector does not explain how he came to know of the decree since he was never served with any proclamation documents by the auctioneers.
6. He also challenged the transfer of the house to the 2nd objector which also happened after the decree had been issued. That the auctioneer went to the premises on 18/7/2022 away before the transfer of the property in November 2022, clearly showing the mischief. And that 2nd objector has not shown any decree nisi to show they are no longer together.
7. The auctioneer, Charles Mutinda Mutua has also filed an affidavit to oppose this application. He has deponed how he had gone to proclaim against the judgment debtor on 18/7/2022, only to be confronted by the judgment debtor with a gun, and in company of his purported body guards. That he had reported the incident to Syokimau police station and was issued with the Occurrence Book which he attached.
8. This application was canvassed by way of written submissions. On the side of the judgment debtor counsel relied on *Precast Portal Structures v Kenya Pencil Co. Ltd & 2 Others* (1993) eKLR, in which it was held;
 - i. That the burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied."
 - ii. That the property was not, when attached, held by the judgment debtor for himself, or by some other person in trust for the judgment debtor.
 - iii. That the objector holds the property on his own account.
9. It was further submitted that in the case of *Kennedy Njuguna v Collins Kiprono Bett & 3 others* (2018) eKLR, the court held that purchase receipts constitute proof of ownership of household goods. That the proclaimed goods therefore belonged to the 2nd objector.
10. Counsel also relied on *Trans-national Bank Ltd v Florence Odhiambo & others* (2006) eKLR, where the court held;

".....being ordinary household items which were found in her own matrimonial home, where she lives, she obviously has an equitable interest in them, and I so find. It seems to me that a spouse will always have an equitable interest in all the household goods in his/her matrimonial home where she/she lives unless it can be shown that any particular item is legally and exclusively owned by the other spouse.."



11. It was further submitted that the judgment debtor has been available in offering settlement of the decretal amount. The first objector based her submissions on the case of *Electrowatts Ltd v Countryside Suppliers Ltd; Mary W. Kamau (objector)* in which it was held;

“In my view, in circumstances of household items, once an objector demonstrates ability to acquire those items, the burden shifts to the judgment creditors to demonstrate otherwise.”
12. She further relies on the case of *Dubai Bank Ltd v Come – Cons Africa Ltd & another* (2012) eKLR.

With regard to the 1st objector it was submitted that a proclamation cannot be undertaken over property which a 3rd party has legal or equitable interest. He relied on Section 8 of the *Traffic Act*, that;

“The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle.”
13. Counsel further submitted based on the case of Precast Portal Structures (*Supra*) where the court held;

“But where the court is satisfied that the property was, at the time of the attachment, held by the judgment debtor as his own and not on account of any other person in trust for the judgment debtor, or that ownership has changed where by the judgment debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the court shall dismiss the objection.”
14. That the transfer could not be regarded as intended to defeat execution where the property subject of transfer was at the time of the transfer, subject of proclamation. Court was urged to find that the vehicle was illegally proclaimed.
15. On the Respondent’s side, it was submitted that the issues for determination are:-
 - i. Whether the motor vehicle identified in the proclamation Notice dated 23/5/2023 can be sold to recover the decretal sum.
 - ii. Whether the household goods identified in the proclamation notice dated 23/5/2023 can be sold to recover the decretal sum.
16. That the 1st objector produced a registration certificate indicating that he motor vehicle xxxx was transferred on 8/1/2023, but fails to produce any other document of purchase or even disclose the consideration. That the decree having issued on 28/7/2021, then the transfer being done on 8/8/2021 was way after the decree had been served in the judgment debtor. He urged that the court adopts the finding in the Precast Portal Structure’s case as the property was divested only to evade execution.
17. On the household goods proclaimed, counsel referred the court to Section 44(1) of the *Civil Procedure Act*, that all property belonging to a judgment debtor, including property over which or over the profit of which he has a disposing power which he may exercise for his own benefit whether that property is held in his name or in the name of another but on his behalf shall be liable to attachment and sale in execution of a decree.
18. That the house in question belongs to the judgment debtor ostensibly transferred to 2nd Objector to defeat the execution process. That the transfer itself was done after the creditor had started demanding for the decretal amount from the judgment debtor. That the judgment debtor and 2nd objector have to attach any decree nisi and so the property was properly proclaimed. Counsel relied on the case



of *Michael Kwana v Raza Property Ltd & ano.* (2008) eKLR that the decision of who owns the households will therefore depend on whether the objector has demonstrated ability to acquire, which it was submitted goes beyond production of receipts.

19. The court was urged to dismiss these objections and allow the execution to proceed.
20. I have considered this application and the rival submissions and the authorities relied on by the parties. This is an application brought up by the two objectors against the execution of the decree held by the Decree holder/Respondents against the judgment debtor on grounds that the property proclaimed belong to the objectors. Order 22 Rule 51 of the *Civil Procedure Rules*, provides:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court, and to all the parties and to the decree holder of his objection to the attachment of such property.”
21. The above provision puts a responsibility on the objector to prove that he is indeed the owner of the property subject of attachment and that the same is in no way the property of the judgment debtor. There are two property subject of attachment herein. First there is motor vehicle xxxx, claimed by the 2nd objector as his property. And second, are the household goods proclaimed and now claimed to belong to the first objector.
22. The issues that arise for determination herein are therefore two fold. They are:-
 - i. Whether the motor vehicle xxxx, proclaimed vide proclamation notice dated 23/5/2023 belong to the objector or whether the same may be sold to recover the decretal sum owned by the judgment debtor.
 - ii. Whether the household goods identified in the proclamation notice dated 23/5/2023 belong to the objector or whether the same may be sold to recover the decretal sum owned by the judgment debtor.
23. With regard to motor vehicle xxxx, the 1st objector/Applicant has made a claim that he bought the same from the judgment debtor and so same is not subject of attachment and sale to recover debts owned by the judgment debtor. He has attached a copy of Log book showing he is the registered owner of the same. The said exhibit show that the said vehicle was transferred to him on 8/1/2020. The judgment creditor has on the other hand, showed a letter from the NTSA showing that the said transfer was actually effected on 28/10/2022 (HE00 – A”). The judgment creditor farther attached a copy of the invoice for payment for the transfer on 28/10/2022.
24. It is worth noting that, the 1st objector, apart from exhibiting copy of log book, has not shown any other relevant document as proof of the sale and transfer. He has not shown the receipt of payment of such transfer of ownership. He has not shown any agreement of sale of the motor vehicle from the judgment debtor to him. He has not even shown the relevant transfer document he presented for registration. And no evidence of payment of any consideration for purchase of the motor vehicle has been shown by the 1st objector.
25. The decree holder/judgment creditor has made several material averments that go to the root of whether the judgment debtor really sold the relevant motor vehicle to the 1st objector, which averments, neither the judgment debtor nor the 1st objector has denied. The decree holder has shown photographs that show the judgment debtor in use and control of the subject motor vehicle well after the date of



the alleged sale to the 1st objector. And that the judgment debtor habitually uses and is still in control of the said motor vehicle.

26. The decree herein was issued on 28/7/2021 and if the sale was on 8/8/2021, then the sale took place after the decree had been issued. To this extent, I am persuaded that the motor vehicle subject of attachment herein belong to the judgement debtor and not the 1st objector. This court is farther convinced that the purported act of sale of the subject motor vehicle by the judgment debtor to the 1st objector was only but meant to conceal the property in order to evade the execution of the decree herein.
27. Regarding the 2nd issue, that of the attachment of household goods, it is noted that neither the judgment debtor nor the 2nd objector has denied that they are a spouse. At least they are. They may be separated as alleged by the 2nd objector but there is no decree nisi, nor decree absolute to show that they are divorced. Further, neither of them have denied the statements made on oath by auctioneer, 1st Respondent, that on going to the judgment debtor's house at Syokimau they found 2nd Objector who requested to be given the opportunity to call her husband, the judgement debtor. That the judgment debtor, on being called actually appeared with his guards, and while wielding his gun, threw out the auctioneers. This shows that the judgment debtor was in control of the house and the households.
28. The subsequent transfer of the title to the house in November 2022, obviously happened after the decree herein had issued.
29. The 2nd objector has exhibited receipts showing that she purchased the proclaimed household items. However, this does not dispel the fact that he judgment debtor was in control of the house and the house holds subject of attachment. It is because of this control that he had to be called home when the auctioneers came home for the proclamation process. This court is convinced that the attached households belong to the judgment debtor who is hell bent on defeating the execution process. In any case the 2nd objector did not prove any ability to acquire those items. (*Electrowatts Ltd v Countryside Suppliers Ltd & Anos., Mary W. Kamau (objector)* (2021) eKLR.
30. I am persuaded in this case, by the authority cited by both sides herein of *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* (1993) eKLR, that where ownership has changed whereby the judgment debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the court shall dismiss the objection.
31. I must say that I find it strange and an improbable coincidence that the judgment debtor would with all honesty set on a frenzy of sale and transfer of his property immediately the decree herein was issued. He purportedly sold his car, which he used to-date and even transferred title to his house to 2nd objector. I am convinced that he acted in the manner he did to conceal his property to evade the execution of the decree herein. And proof of this is how the 1st objector surfaced to file this objection. How could he have known about the decree herein and yet no proclamation had been effected on him. His action of filing this objection proceedings must only have been motivated by a desire to assist the judgment debtor evade execution.
32. In all therefore, and on a balance of probabilities, I do not find any merit in the objection raised by the 1st and 2nd objectors. I accordingly dismiss the objectors' application dated 23/6/2023. The decree holder/Respondents are awarded costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF MAY, 2024.

D.O. OGEMBO



JUDGE

23/5/2024

Court

Read out in Court in presence of Ms. Isoi Mugandi Otieno for the Objectors. Otieno O. C for Respondent.

D.O. OGEMBO

JUDGE

23/5/2024

