



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCMISC. APPL. NO. 14(B) OF 2019

MICHIRA MESSAH & COMPANY ADVOCATES.....APPLICANT

VERSUS

KATANA KALUME NDURYA.....RESPONDENT

AND

KALUME KENGA KATANA.....OBJECTOR

Coram: R. Nyakundi, J

Onchangu Kemunto & Associates Advocates

Mogaka Bwongaki & Co. Advocates

J. K. Mwarandu & Co. Advocates

RULING

This is a long standing protracted litigation arising out of an objection by the Objector against the sale of motor vehicle registration number KCR 491L by Malindi Auctioneers.

The subject matter of the objection as expressed in the notice of motion dated 19/3/2019 was an averment that the Objector was never a party to the proceedings in Misc. Application No. 29 of 2016 that resulted in the decretal sum; resultant of the said auction.

Further, that the motor vehicle sought to be sold by the public auction belonged to the Objector Kalume Kenga Katana not the respondent Katana Kalume Ndurya. In support of the application is an affidavit sworn by Kalume Kenga Katana filed in court on 19/3/2019.

The crux of the affidavit by the Objector is to the effect that the said motor vehicle as being proclaimed for auction was never registered in the name of the respondent to the decree. That at no time was he a party to the on-going proceedings in Misc. No. 29 of 2016 between **Michira Messah & Company Advocates vs Kalume Katana Ndurya**. That to the best of his knowledge the respondent passed away sometime in the year 19/9/2018, as annexed photocopy of the certificate of death marked as KKK2, proves beyond reasonable doubt. Finally, the Objector deponed that in spite of that he has never been an administrator or legal representative to the estate of the deceased.

In response to the application the respondent counsel Mr. Mogaka Nyaboga filed a replying affidavit where he averred *inter alia*, that the objection which was earlier dismissed had been overtaken by events. That the certificate of costs was properly issued by the taxing master and the same having been rendered conclusive gave way to execution proceedings. That the notification of sale was issued on 22/2/2019 and that the subject motor vehicle was registered in the name of the judgement-debtor's son. That the objection having been dismissed for want of prosecution under Order 17 rule 2 of the Civil Procedure Rules resulted in the present application being rendered moot. Further, the respondent deponed that on 7/1/2019 a warrant of sale of property in execution of decree for money issued together with warrant of attachment of movable property, in execution of the decree for money and served upon the applicant's brother Stephen Charo and parents. That on 3/3/2019 the motor vehicle was re-advertised on the Daily Nation for 19/3/2019 which occurred at 11.00 am. That on 13/3/2019, the attached motor vehicle was transferred and registered in favour of the purchaser at a public auction one Fredrick N. Kamau following a public auction.

The undisputed facts of the whole legal zaga in this proceedings: At one time or another the Firm of Michira Messah & Co. Advocates had been retained by Kasena Yeri to draft all agreement on 20/11/2012 for the sale of land Parcel No. 1037 situated at Mamburui-Malindi. As part of the terms the vendor – Joseph K. Yeri was to sell to the purchaser My Home Ltd at a consideration of Shs,6,000,000/=. Further in

the aforesaid agreement the payment for the parcel of land was to be settled by way of instalments. It was also agreed that the Advocates fees shall be 5% of each instalment paid by the purchaser.

On 13/10/2016 the Firm of Michira Messah Co. Advocates filed a bill of costs against their client Joseph Kasena Yeri seeking taxed fees of Ksh.246,885/= for professional legal services in the matter of sale agreement dated 20/11/2012. On or about 18/11/2016 Joseph Kasena Yeri filed an objection to the taxation of the bill of costs on grounds that he was not a party to Misc. Application No. 29 of 2016 and the issues on the dispute as to fees are matters under criminal investigations and the Advocates Complainants Commission.

In the same Misc. Application No. 29 of 2016, the Firm of Michira Messah filed an Advocate and Client bill of costs dated 28/6/2016 against another respondent/judgement debtor Katana Kalume Ndurya, arising out of professional legal services in the matter of sale of land in an agreement dated 20/11/2013 for payment of agreed fees of Ksh.3,500,000/=.

In the interim to the extent of that Advocate-Client bill of costs, a consent order was reached on 21st March 2017 between both parties to liquidate costs in the following terms:

(1) The respondent Katana Kalume Ndurya to pay the law firm Michira Messah Co. Advocates the sum of Ksh.700,000/= as legal fees in full and final settlement of the bill of cost dated 28/8/2016.

(2) The respondent has on the day of the consent paid the law firm the sum of Ksh.50,000/= leaving a balance of Ksh.65,000/=.

(3) The respondent to pay the applicant law firm the sum of Ksh.500,000/= on 30/7/2017 and the balance of Shs.150,000 on 30/8/2017.

That consent generated a certificate of taxation dated 18/9/2017. Pursuant to that certificate of taxation, the decree-holder Michira Messah Co. Advocates applied for warrant of sale of property in execution of the money decree against the respondent Katana Kalume Ndurya duly issued on 7/1/2019 to Malindi Auctioneers.

So far as the question of executability of the consent is concerned, there is no evidence of it being adopted by the court as the elaborate provisions dealing with such consents in all aspects. The auctioneer acting on such instructions moved to proclaim and attach motor vehicle registration number KCR 491L on 8/1/2019 at Ngomeni. That proclamation and attachment triggered an objection by Kenga Kalume Katana dated 18/3/2019. That objection was to the effect that the subject motor vehicle belonged to Kalume Kenga Katana who was never a party to the proceedings in Malindi High Court Misc. Application No. 29 of 2016. The objector prayed for the lifting of the proclamation and attachment. In the meantime, the purchaser of the motor vehicle at the public auction moved the court by way of a notice of motion seeking a vesting order.

Having considered the litigation history and various affidavits and other annexures the one-million-dollar question to be considered by the court is whether the objector has discharged the burden of proof on a balance of probabilities against the applicant – decree holder.

DETERMINATION

The Law

As provided for under **Order 22 rule 51(1) of the Civil Procedure Rules**, “Any person claiming to be entitled to or have a legal equitable interest in the whole 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 parties to the decree holder of his objection to attachment of such property.”

It is legal prism that the objector has the burden of proof in relation to the facts in issue and relevant to the objection. Generally speaking, the facts in issue in any case are those disputed issues of fact which a party must prove to succeed and obtain judgement in his favour.

In **Arun v C. Sharma Astana Raikundaha t/a Raikundaha & Co. Advocates & 4 Others [2014]** the court stated as follows “**the objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are, entitled or to have a legal or equitable interest in the whole or part of the property.**”

In the sense of the evidential burden once the objector discharges the burden of proof on ownership that the property in issue legal or beneficial interest vests with him or her and not the judgement debtor. That sufficient evidence obligates the court to lift the attachment. As the learned author **Dennis, Principles of Law of Evidence 2nd Edition (Repealed 2004)** at 374 “*when a party has discharged an evidence at burden and raised an issue for the court to consider, there arises a technical onus on the other party to adduce further evidence has been adduced increases the risk of loosing on the issue if nothing is done to challenge the evidence. In the strict legal parlance, the objector’s standard of proof has to be listed with parameters provided for under Order 22 rule 51(1) of the Civil Procedure Rules which envisages “that he or she must prove that he or she is not the person against whom the decree was review against and therefore not liable to meet the terms of the decree. Secondly, he or she must prove that the execution of his or her property has been proclaimed and attached to satisfy the decree. Thirdly, he or she must prove that he or she is entitled or to have a legal or equitable interest in the whole or part of any property attached and the execution of the decree. Finally, he or she must prove that no payment out of the proceeds of the attached and sale of the property has been made.*”

In the case of **Grace Wanjiru Mbugua v Philip Karumi Matu [2009] eKLR** and **Precast Portal Structures v Kenya Penal Co. Ltd & 2 Others [1993] eKLR** the courts observed that, “The burden is on the objector to prove and establish his right to have attached

property released from attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied:

(1) That the property was not when attached held by the judgement debtor for himself or by some other person in trust for the judgement debtor; or

(2) That the objector holds that property on his non account. But where the court is satisfied that the property was, at the time of attachment, held by the judgement debtor, as his own and not on account of any other person, or that it was held by some other person in trust for the judgement debtor or that ownership has changed, whereby the judgement debtor has been divested of the property in order to evade execution, on the change is tainted with fraud, the court shall dismiss the objection.

The court takes into account the grounds of objection raised and the contentions of the respective parties to the objection proceedings. Any special feature evident in the proceedings which shed light to the controversy must be of essence lead to lifting of the attachment.

An important question in the context of this objection proceedings has been stated in **Abdalla Ali Hassan v Clement A. Ojiambo & Others CA No. 118 of 1997** which laid down a definite criterion in determining the objection to attachment in execution of the decree as follows; **“Where the decree holder does not intimate his intention to proceed with the attachment the objector may request by way of letter for the attachment to be typed, but where he instead files an application, the court is obliged to investigate the title and make inferences from the material before her.....Section 8 of the Traffic Act simply states that unless the contrary is proved, the person in whose name the motor vehicle is registered is deemed to be the owner, in other words, the fact of registration is only prima facie evidence of ownership and contrary facts can show otherwise, that registration was done to defeat the execution of the decree.”**

The principles enunciated in the above cases as reiterated are applicable to the present application. On consideration of the matter and based on the affidavit evidence of both parties to the controversy there are valid questions as to legal right and title to the subject motor vehicle. That is on account whether it was registered in the name of the objector or the judgment debtor, herein one Katana Kalume Ndurya.

In his quest to resolve and prove by way of concrete evidence of an illegal or irregular proclamation and attachment, the objector exhibited a copy of logbook as FNK-3 issued on 13/3/2019 showing particulars of registration to be that of Kalume Kenga Katana of Box 39 Malindi. Further there is also incontrovertible specifics of his PIN A013126333E. It is clearly undisputed that as the registered owner of the subject motor vehicle No. KCR 491L he had never been cited or sued as a party by the firm of Michira Messah & Co. Advocates in Misc. Application No. 29 of 2016. It is also uncontested fact that the firm of Michira Messah & Co. Advocates has never been retained by the objector to provide professional legal services in respect of the matter of agreement of sale dated 20/11/2013 or on a consent order to pay Advocates fees dated 27/6/2014.

Be that as it may be, the applicant failed to controvert the evidence by the objector as to that legal or equitable title, or beneficial interest upon the attached motor vehicle to entitle him right of attachment in execution of the decree. There is no further explanation that prior to the signing of the decree of the court, the subject motor vehicle was registered in the name of the judgement-debtor Katana Kalume Ndurya, necessitating and justification to attach and sell to a third party.

As to whether an objection lies the broad perspective the court is expected to take into account is as provided for in the cases of **Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743 and David Muhenda & 3 Others v Margret Kamuje Succession Cause No. 9 of 1999** in which the court stated as follows:

“Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the objector, and in all other respects as if he was a party to the suit. The objector shall adduce evidence to show that at the date of attachment he has some interest in the property attached. The question to be decided is, whether on the date of attachment, the judgement debtor or the objector was in possession or where the court is satisfied that the property was in possession of the objector, it must be found whether he held it on his own account or in trust for the judgement debtor. The sole question to be investigated is, thus one of possession of and some interest in the property.”

Having regard to the provisions of section 8 of the Traffic Act, the applicant failed to address that fundamental issue on the right of ownership, but instead ventured on procedural errors and delay by the objector to prosecute his application.

I am further fortified that the purported proclamation, attachment and sale of the motor vehicle was initiated on 7/1/2019 and effected on 8/1/2019 against the judgement debtor – Katana Kalume Ndurya who had since died on 19/9/2018 as per proof demonstrated by the annexed death certificate issued on 24/10/2018. The legality of any commencement of proceedings against the estate of the deceased is premised on the Probate Will or Grant of Letters of Administration issued under all provisions of sections 8, 9, 11, 56 to 66 of the Law of Succession Act. If the judgement creditor, the applicant actually wanted to execute against the estate of the deceased, it was necessary for him to satisfy himself that an executor or administrator has been appointed in accordance with the law with rights of being used to settle liabilities of the estate.

I bear in mind the provisions of section 79 of the Act which states that **“the executor or administrator to which representation has been granted shall be the personal representative of the deceased for all purposes of the grant and subject to any limitation imposed by the grant all the property of the deceased shall vest in him as a personal representative.”**

When these provisions are applied to the application for attachment, against the respondent (now deceased). In January 2019 for a purported constraining decretal-sum due and owing in **Misc. Application No. 29 of 2016** there was no executor or administrator with grant of letters of administration to receive the court processes on execution of the decree. Thus **section 82** of the Act donates powers of personal representatives in the following terms:

“They have power to enforce suits whose cause of action survive the death of the deceased, to sell and turn to account all or part of the assets vested in them, ensure that any immovable property can only be sold after confirmation to assent to vesting orders after confirmation, to appropriate after confirmation any assets vested in them.”

With regard to the issue at hand any execution process initiated against the estate of a deceased person without any evidence of grant of letters of administration is void *abinitio*. Once any proceedings fall within the succession path its incumbent upon a party with interest to that estate to confirm existence of an administrator or executor, who is capable of suing or being sued as a legal representative to the estate.

I note with concern that the applicant counsel filed applications for execution of the decree against the judgement debtor and over his property though it was not a competent and fit case for execution. This was in view of the death of the judgement debtor on 19/9/2018. The execution proceedings to realise the decretal sum without grant of letters of administration to his estate would be deemed irregular. None of the orders on record would come in the way of a trial as well as executing court to adjudge the dispute strictly on the basis of pleadings without an appointment of an executor or administrator to the estate of the deceased. The aforesaid transfer of the subject motor vehicle averred to by the applicant to have taken effect on the 13/3/2019 between the judgement debtor and the objector is basically a misrepresentation of facts to say the very least. It is inconceivable and with great respect to the applicant that the judgement debtor was capable of resurrecting from the grave to effect the transfer of motor vehicle in favour of the objector. If the facts pleaded by the applicant are correct.

In the light of the clear language in the Law of Succession Act on probate and intestate estate it is not possible to accept the submission of learned counsel for the applicant for a vesting order to issue to the purchaser for value of the property. More significantly, the objector has placed before court prima facie evidence on legal title to property and of being a stranger to the pending civil proceedings between the deceased and the applicant.

In my view all the orders issued by the court on service of the decree and subsequent attachment or sale under the Civil Procedure Rules were all null and void for lack of grant of letters of administration. This is buttressed under **section 37(1) of the Civil Procedure Act** which provides that:

“Where a judgement debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased or against any person who has intermeddled with the estate of such deceased”. (See also Rule 7 (1) of the Probate and Administration Rules.)

I have the greatest sympathy for the purchaser of the said property for what he might suffer from acutely unprocedural and illegal processes to vest right to property which had not accrued by either a legal conveyance/sale or proper court order. I feel constrained to point out that the applicant Law Firm in the end of it all failed to adhere to due diligence or comply with the laid down statutory legislated procedures on enforcement and execution of the decree in Misc. Application No. 29 of 2016. The execution applications filed by the applicant in my view was not maintainable.

The court is therefore satisfied that the objector was the registered owner of the motor vehicle KCR 491L with full rights and interest over that property at the time of attachment. It was never served with any notice of proclamation or attachment by the decree-holder on 1/1/2019. Similarly, the objector has no privity of contract on professional legal services with the applicant, the Firm of Michira Messah & Co. Advocates to warrant a certificate of costs and subsequent judgement enforceable through execution on attachment of movable property. The identified suit property was therefore wrongly proclaimed and attached by the applicant.

It is noteworthy that the right to private property is protected by the Constitution under Article 40 in which it stipulates that no citizen shall be deprived of his or her property arbitrarily.

Despite existence of this right the applicant without any colour of right instructed Malindi Auctioneers to proclaim and attach the objector's motor vehicle who was neither a party to the decree nor legal representative to the deceased estate.

As a consequence, this sale by itself was illegal and unlawful having been made contrary to the Constitution and other statutory legal provisions provided for under the Civil Procedure Rules and the Law of Succession Act. The sale was commenced and completed without regard to due process and that at the time title was vested in the objector a stranger to the decree of the court. On the other hand, execution proceedings were commenced against the estate of the deceased without existent of grant of letters of administration issued to any of recognized legal representative by a probate court.

The court in **Muwainga v Stephen Kyeyune [SCCA 12] 2001** the Supreme Court of Uganda had this to say on issues of this nature thus:

“A judicial sale, unlike a private one, was not complete unpredictably. It took place it was liable to be set aside on appropriate proceedings the fact that the property had been sold and a return made by the time of the objector proceedings cannot preclude the court from enquiry into the merits of the sale and infact setting aside such sale.”

If there is ambiguity in the decree, the court of execution is not bound to execute it. The decree cannot be executed upon an adult member of the family to the judgement debtor who had no adequate notice of the pending decree and how it affects his rights to property. Under the guise of execution, the applicant exactly served a member of the family with execution notice and not the deceased, considered dead at the time of service. It was easy for the applicant to visualize that his client Kalume Ndurya Katana had not been served with the decree as immediately, thereafter an Objector had claimed right, title and interest to the attached motor vehicle. Persistence made by the applicant to go ahead with the attachment and sale inspite of the Objection was in the circumstances aimed at defeating the rights of the Objector.

The sale agreement entered into after a public auction with the purported bidder Fredrick Kamau Njeru was completely illegal, unprocedural

and unlawful to be countenanced by the court. The jurisdiction of the court is not to enforce illegal public auction that have no foundation in law.

Having regard to all facts and circumstances of the case which I have discussed above, I consider it just and proper to issue the following orders:

(a) The objector has proved on a balance of probabilities that the subject motor vehicle Reg. No. KCR 491L legally belonged to him at the time of the decree, subsequent proclamation and attachment by Malindi Auctioneers is untenable.

(b) The proclamation, attachment and sale effected by Malindi Auctioneers under instructions from judgement debtor on 19/3/2019 was unlawful, illegal and unprocedural is hereby set aside.

(c) That a declaration do issue in respect to the suit property motor vehicle Reg. No. KCR 491L, be and is hereby released from attachment and any such purported sale is hereby set aside. The aforesaid registered motor vehicle do revert to the original registered owner identified as Kalume Kenga Katana.

(d) Going back to the instant case and in accordance with the provisions under the Law of Succession the decree arising from Misc. Application No. 29 of 2016 at Malindi between Michira Messah & Co. Advocates v Kalume Katana Ndurya shall forthwith remain a liability to be listed as such in the petition for grant of letters of administration.

(e) The category of applications filed on execution of the decree against the judgement debtor in absence of grant of letters of administration and appointment of a personal representative or administrator to the estate of the deceased are void abintio.

(f) The other consideration is that a declaration do issue herein that the applicant Law Firm Michira Messah & Co. Advocates jointly with Malindi Auctioneers for breach of professional duty of care in the circumstances of this case against the purchaser for value move to make good by reimbursing the purchase price and other incidentals to Fredrick Kamau Njeru incurred at the fall of the hammer for the sole purpose of restoring him to the original position before the breach. The application by the purchaser for a vesting order stands dismissed for being fatally defective.

(g) The objector shall also have the costs arising out of the objection proceedings.

Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Michira for the Applicant

Fredrick Kamau - purchaser present

Gekanana for Mouko for Objector - present