



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CIVIL CASE NO. 113 OF 2016

RAMESH R. VAYA & KUNDAN R. VAYA (suing as the legal representative of the
late **VEREN R. VAYA (DECEASED)**).....**PLAINTIFF/JUDGEMENT HOLDER**

VERSUS

HITEN K. LIMBANI**DEFENDANT/APPLICANT JUDGEMENT DEBTOR**

AND

RAJU KANJI LIMBANI**1ST PROPOSED INTERESTED PARTY**

JEREMIAH KIARIE MUCHENDU

T/A ICON AUCTIONEERS.....**2ND PROPOSED INTERESTED PARTY**

RULING

1. The Defendant herein filed an application dated 8/12/2020 pursuant to section 3, 3A and 44 of the Civil Procedure Act, Order 22 and Order 40 Rules 1 and 2 of the Civil Procedure Rules and Articles 159 (2) of the Constitution seeking the following reliefs:-

1. Spent.

2. That the court be pleased to enjoin Raju Kanji Limbani and Jeremiah Kiarie Muchendu T/A Icon Auctioneers as the 1st and 2nd proposed interested parties in this suit respectively.

3. That this court be pleased to grant a temporary stay of execution of the proclamation of attachment/repossession/distrainment of movable property in execution of notice dated 27/11/2020 and any consequential actions by the Auctioneers pending the hearing and determination of the application.

4. That this court be pleased to issue a temporary injunction restraining the Plaintiff and the 2nd proposed interested party whether by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienation, sale, removal or disposition of the movable items that are stated in the proclamation of attached/repossession/distrainment of moveable property dated 27/11/2020 or any part thereof pending the determination of the application.

5. That this court be pleased to lift or revoke the warrants of attachment dated 27/11/2020.

6. That this court be pleased to allow the Defendant/Applicant to forfeit a portion of his monthly salary in order to satisfy the judgement issued herein.

7. That this court do issue any such order or further orders as the justice of the case demands.

8. That the costs be borne by the Plaintiff and the proposed 2nd interested party.

2. The Application is supported by grounds set out on the face thereof and further by the affidavit of the Defendant/Applicant sworn on even date. The Defendant's gravamen *inter alia* is that the 2nd proposed interested party has unlawfully carried out proclamation of the 1st proposed interested party's movable properties such as motor vehicles registration numbers KCD 643F, KQY 103 and KTC 075 as well as M/v KAC 918A and KPZ 574 registered in the name of Limbani Motors. It is the Applicant's case that the 1st proposed interested party is his uncle and owner of Limbani Motors and who has been greatly affected as his household goods have been listed for seizure by the Auctioneer. It is further the Applicant's case that he does not own any of the attached vehicles or household goods. The Applicant confirms that he is a motor vehicle mechanic earning a net salary of Kshs. 89,000/- out of which he seeks to be allowed to liquidate the decretal sums by monthly instalments of Kshs. 20,000/- until payment in full. The Applicant contends that the 1st proposed interested party will suffer irreparable loss if the items are sold in a public auction. Finally, it is the Applicant's case that the Auctioneer's charges are colossally high.

3. The 1st proposed interested party filed an affidavit in support of the application sworn on even date wherein he deposed *inter alia*: that the Defendant/Judgement debtor resides and is being housed by him; that the 2nd proposed interested party has proclaimed goods that belongs to him and his company Limbani Motors yet they are not owned by the judgement debtor; that some of the vehicles proclaimed belonged to customers who had brought them for servicing; that he stands to suffer great loss if the items are sold in a public auction yet he is not a party to the suit; that the judgement debtor does not hold any proprietary interest or possess disposing power which he may exercise for his own benefit over the movable properties.

4. The Plaintiff/judgement creditor filed a replying affidavit dated 15/02/2021 where he deposed *inter alia*; that the 1st proposed interested party is a brother to the judgement debtor with whom they have colluded to hide the properties going by the fact that the ownership on the logbook of the vehicles were transferred on 31/12/2006 and 22/09/2017 after the accident to Limbani Motors; that according to Hindu customs all properties are registered in joint family and in this case Limbani Motors is a joint family business; that the judgement debtor is out to frustrate the case to the plaintiffs detriment who has had to wait for over 14 years to secure a judgement; that the judgement debtor's proposal to liquidate the sums by Kshs.20,000/- monthly is an insult and injustice to him as he lost his son in the accident and for whom he had invested heavily as he wanted him to become a pilot; that the judgement debtor be compelled to pay the total sums of Kshs.3,407,886/- plus costs and interest of Kshs.2,672,677/- as well as the auctioneers fees of Kshs.485,000/-; that in the alternative, the total sum of Kshs.6,081,563/- be deposited in court and half be released to him.

5. Parties filed written submissions. The judgement debtor's submissions are dated 17/03/2021 while those of the judgement creditor are dated 3/03/2021.

6. Learned counsel for the Judgement debtor raised two issues for determination namely whether the judgement debtor owns any property indicated in the proclamation and whether the judgement debtor can settle the sums by payment of instalments through his salary. On the first issue, counsel submitted that the judgement debtor does not own any of the attached properties as they belong to the 1st proposed interested party who is an uncle to the judgement debtor and that the said uncle is not a party to this suit. Counsel discounted the decree holder's claim that under Hindu customs property is jointly owned since the Constitution of Kenya is clear about individual property ownership. Learned counsel was of the view that the 1st proposed interested party be allowed to keep his properties while the judgement debtor be allowed to pay up the monies. On the second issue, it was submitted that the judgement debtor be allowed to clear the sums in instalments until payment in full. Reliance was placed in the cases of **Freight Forwarders limited –vs- Elsek & Elsek (K) limited [2012] eKLR and Singh Gitau Advocates –vs- City Finance Bank limited [2013] eKLR** where it was held that the court could allow settlement of decretal sums by way of instalments if a debtor was unable to pay in lumpsum and that the application is made in good faith and that the repayments are reasonable. It was also submitted that the alleged auctioneers fees of Kshs. 485,000/- are contrary to the Auctioneers Act 4th Schedule and further the claim for interest on the decretal sum is uncalled for since the judgment creditor only took out the decree four (4) years after delivery of the judgement and hence the only amounts due is the decretal sum of Kshs. 3,407,886/-.

7. Learned counsel for the judgement creditor submitted that the judgement debtor's application is in bad faith since the proposed 1st interested party is a brother to the Applicant and they own joint family business. It was submitted that the judgement debtor should be compelled to pay the whole sums or be sent to civil jail in default. It was also submitted that the request by the debtor to pay the sums in instalments of 20,000/- per month will take a period of 20 years. Counsel urged the court to dismiss the application with costs.

8. I have considered the application rival affidavits and submissions. It is not in dispute that the defendant debtor is yet to satisfy the judgement of this court delivered on 2/12/2015. It is also not in dispute that the 2nd proposed interested party has commenced the execution of the judgment/decreed by proclaiming some properties found in possession of the 1st proposed interested party. It is also not in dispute that the judgement debtor has not preferred an appeal against the judgement as he is ready and willing to satisfy the same if he can be allowed to liquidate the decretal sums in instalments. I find the following issues necessary for determination namely:

i. Whether the 1st proposed interested party has established that he has a legal or equitable interest on the whole or part of the proclaimed properties so as to warrant the orders being sought.

ii. Whether the judgement debtor's request to liquidate the decretal sum by monthly instalments of kshs. 20,000/- has merit.

iii. What orders may the court make?

9. As regards the first issue, the judgement debtor herein appears to say that the goods proclaimed do not belong to him but rather to the 1st proposed interested party. The guiding provisions of the law regarding objections to attachments is found in order 22 Rule 51 (1)(2)(3) of the Civil Procedure Rules as follows:-

“any persons claiming to be entitled to or have a legal or equitable interest in the whole or part of any property attached in execution of 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 and to the decree holder of his objection to the attachment of such property.”

From the foregoing, it is clear that the objector bears the burden of proving that he is entitled to or has a legal or equitable interest on the whole or part of the attached property so as to justify the objection proceedings. The 1st proposed interested party seeks to come on board as an objector in these proceedings and has annexed copies of logbooks to the proclaimed vehicles and which show that M/v KPZ 514 is registered in name of Limbani Motors; M/v KAC 918A registered in Limbani Motors; M/v KCD 643F registered in name of Masai Mara wilderness (Kenya) limited; that M/v KKY 103 and KTC 075 belong to customers who brought them to Limbani Motors workshop for repairs; that the proclaimed household goods belong to him and not the judgement debtor. However, it is noted that the 1st proposed interested party has not produced any document showing that he owns the household goods and further has not availed any document regarding his legal or equitable interest in the mentioned motor vehicles. He has claimed that Limbani Motors is his business enterprise but he has not furnished documents as to whether the business is registered under the Business Names Act or incorporated under the Companies Act. He did not produce the requisite certificates so as to enable the court to agree with him that he has a stake or interest in those properties. The other properties are registered in names of other entities and he has not shown that he also has an interest therein so as to back up his objection herein as he is under obligation to satisfy the conditions of order 22 rule 51 of the Civil procedure Rules. In the case of **Precast Portal Structures –vs- Kenya Pencil Co. Limited & 2 others [1993] eKLR** the court held as follows:-

“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 placed before the court, a release attachment may be made if the court is satisfied:-

i. 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; or

ii. That the objector holds that property on his own 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 the ownership has changed whereby the judgement debtor has been divested of the property in order to evade execution or the change tainted with fraud, the court shall dismiss the objection. The court takes into account the grounds of the objections raised and the contentions of the respective parties to the objection proceedings. Any special features evident in the proceedings which throw light on the controversy must be regarded.”

10. Looking at the explanation offered by the 1st proposed interested party and the judgment debtor, it is quite clear that the two have hatched a plot to frustrate the decree holder’s attempt to secure the fruits of the successful litigation. Whereas the judgement debtor claims that the properties proclaimed do not belong to him, the 1st proposed interested party has failed to avail documentary evidence to prove ownership or beneficial interest in the proclaimed goods. It would appear to me that both the judgement debtor and 1st proposed interested party are not candid and hence the decree holder’s misgivings appear to have some basis. Both the judgement debtor and 1st proposed interested party have claimed that the household goods belong to the entire Limbani family pursuant to the way Hindu culture is observed. However, no documentary evidence has been tendered to the court for consideration. It seems the judgement debtor is out to hide himself by any means from being called upon to satisfy the decree. As the properties appear to be in names of other entities it is for those entities to lodge the objection but not the 1st proposed interested party who has failed to prove any legal or equitable interest in the proclaimed goods. Hence the first issue is answered in the negative.

11. As regards the second issue, it is noted that the decretal sums as per the judgement dated 2/12/2015 stands at Kshs. 3,407,886/- and in the course of time the same has risen due to interest, costs and auctioneer’s fees. The judgement debtor has proposed to liquidate the same by way of monthly instalments of Kshs. 20,000/- until payment in full. The proposal has been vehemently opposed by the decree holder who maintains that it would take about twenty (20) years to clear. Indeed, a court has discretion to allow a party to pay decretal sums by instalments if the application is made in good faith and that the monthly repayments are reasonable. As noted above, the conduct of the judgement debtor in seeking to evade payment by hiding behind the 1st proposed interested party is a factor for consideration. Already the said 1st proposed interested party has failed to establish his nexus to the ownership of the proclaimed properties. It is clear to me that the judgement debtor and the 1st proposed interested party have hatched a plan to frustrate the decree holder from enjoying the fruits of his judgement. On the issue of the proposal I find the sum of Kshs. 20,000/- per month will take over two (2) decades to clear which is fairly a very long period indeed. The decreeholder is likely to suffer prejudice if the request is granted. Consequently, I decline the judgement debtor’s proposal to clear the sums via instalments. Suffice to add that not a single cent has been paid by the judgement debtor right from the date of delivery of the judgement to date and hence the application is not made in good faith and that the proposal is not reasonable. I find that he is not a suitable person to be granted the discretionary remedy to pay the decretal sums by way of instalments.

12. Before coming to the end of this discussion, I need to comment on the decree holders request that the judgement debtor be committed to civil jail if he fails to pay up the decretal sums. I must point out at this juncture that this court was determining the judgement debtor and 1st proposed interested parties application and not application or notice to show by the decreeholder against the judgement debtor. The decree holder should initiate the requisite processes first in the execution of the decree before coming to the last resort of seeking to commit the Judgement debtor to civil jail. In fact, the matter is at the stage of execution of the decree and hence the decreeholder cannot abandon a process that he had commenced and jump to the tail end procedures. Consequently, I decline the invitation by the decree holder at this stage to commit the judgement debtor to civil jail until he exhausts all the requisite processes.

13. Finally, on the issue of joinder of the proposed interested parties, it is noted that the 2nd proposed interested party did not participate in the hearing of the application as he did not file an affidavit and hence he cannot be forced to join the proceedings against his will and also due to the fact that no evidence has been tendered to show that the said proposed 2nd interested party has an interest or stake in the subject matter. As regards the 1st proposed interested party, it is noted that he has failed to prove that he has any legal or equitable interest in the proclaimed properties so as to found his status as an objector and hence the prayer for joinder must fail.

14. In light of the foregoing observations, it is my finding that the Judgment debtor and 1st proposed interested party’s application dated

8/12/2020 lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF JULY, 2021

D. K. KEMEI

JUDGE