



**Celina Trading LLC v Ngao Credit Limited & another; Njoroge
(Objector); Auctioneers (Interested Party) (Civil Case 281 of 2015) [2021]
KEHC 18 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 18 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 281 OF 2015
DAS MAJANJA, J
SEPTEMBER 10, 2021**

BETWEEN

CELINA TRADING LLC PLAINTIFF

AND

NGAO CREDIT LIMITED 1ST DEFENDANT

SALOME WANGUI NJOROGE 2ND DEFENDANT

AND

STEVEN KARIUKI NJOROGE OBJECTOR

AND

CHAKA & COMPANY AUCTIONEERS INTERESTED PARTY

RULING

1. On 29th November 2019, the court entered judgment in favour of the Plaintiff and against the 2nd Defendant for the sum of USD 173,391.05 together with interest thereon at court rates from the date of filing suit until payment in full. The court issued a decree dated 26th January 2021. The Plaintiff instructed the Interested Party (“the Auctioneers”) to execute the decree. On 3rd August 2021, the Auctioneers proceeded to a House located at within Runda Estate (“the House”) and proclaimed the household goods and motor vehicles registration numbers KBF 381U and KBN 271T.
2. In order to forestall the sale of the proclaimed goods and motor vehicles, the Objector lodged objection proceedings under Order 22 Rule 51 of the Civil Procedure Rules (“the Rules”). The application is supported by the grounds on its face and the affidavit of the Objector sworn on 6th August 2021.



It is opposed by the Plaintiff through the replying affidavit of Sasha Nedelkovski, the Plaintiff's International Sales Director sworn on 13th August 2021. The parties, through their Advocates, made brief oral arguments.

Analysis and Determination

3. Before determining the substance of the application, I will deal with the issue of the competence of the application raised by the counsel for the Plaintiff. The Plaintiff submits that the Objector failed to follow the procedure under Order 22 Rule 51 of the Rules by failing to give notice to the court and on all parties, especially to the 2nd Defendant as the judgment debtor. The said provision states as follows:

51. Objection to attachment [Order 22, rule 51.]

- (1) Any person claiming to be entitled to or to have a legal or 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 the parties and to the decree-holder of his objection to the attachment of such property.
- (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
- (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

4. A reading of Order 22 Rule 51(1) above shows that it is couched in discretionary rather than mandatory terms, thus, the failure by the Objector to give notice to the court and other parties is not fatal to the application. In any case, the application was duly served together with the order staying execution thereby bringing to all the parties attention the objection proceedings.

5. Turning to the merits of the application, the main issue for determination is whether the Objector has established a legal or equitable interest in the whole or part of the attached property. Order 22 Rule 51 of the Rules above places the Objector with the burden of proving that it has a legal or equitable interest on the whole or part of the proclaimed/attached goods. This position has been buttressed by the court in a plethora of decisions including *Chotabhai M. Patel v Chaprabhi Patel*, where the following principles were distilled:

- a) 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 party to the suit.
- b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
- c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.



d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry. [Emphasis mine]

6. The question is thus whether the Objector has proved that the proclaimed household goods and the motor vehicles registration numbers KBF 381U and KBN 271T named in the proclamation notice dated 3rd August 2021 belong to him.
7. The Objector, in his deposition has annexed a certificate of lease, receipts and motor vehicle copy records to prove his proprietary interests over the proclaimed goods. The Plaintiff, on the hand stated that the Objector and the 2nd Defendant live in the House as husband and wife and that the receipts annexed by the Objector have no corresponding ETR receipts and are thus not valid. While the Plaintiff did not produce any evidence to show that the Objector and the 2nd Defendant live in the House as husband and wife as claimed, the Objector did not deny this averment in any subsequent deposition. He also did not deny that the House is also the residential dwelling of the 2nd Defendant. I still find that the decision in Michael Kwena v Raza Properties Limited & Another NRB HCCC No. 1914 of 2000 [2008] eKLR is apposite as was held that:

‘As observed by Ringera J. as he then was in the KENYA OIL COMPANY LTD CASE (SUPRA). “Once the objector demonstrates ability to acquire households goods, the burden shifts to the judgment creditor to demonstrate otherwise”. In a situation of man and wife, a situation that this court, has judicial notice of as a result of the discharge of duties in relation to disputes relating to man and wife properly rights, the right to contribution to acquisition either directly or indirectly is almost unquestionable. Household goods are meant to be for the use of the entire family. It is therefore difficult to put a clear distinguishing line as between what belongs to the husband as opposed to what belongs to the wife. The assumption usually is that there is common usage for all the family of all the households, thus making difficult to make a clear and precise decision as to what belongs to the wife as opposed to the husband.

As observed by Ringera Judge, as he then was, the person who could be called upon to shed some light on the ownership, are the shop keepers from whom the goods were purchased. But as observed, it is not a normal practice for courts to call shop keepers to prove such purchases. The decision of who owns the households will therefore depend on whether the objector has demonstrated ability to acquire. In this courts’ opinion, the objector herein has demonstrated such an ability by virtue of her being in gainful employment and by her being a family member. The objection against the attachment of the household goods is therefore upheld.’

(Also see Electrowatts Limited v Countryside Suppliers Limited & another; Mary W. Kamau (Objector) ML HCCC No. 728 of 2000 [2021] eKLR)

8. As already stated, the Objector has produced evidence of receipts of purchase of the household goods that bear his name. The Objector has further provided the House’s Certificate of Lease which also bears his name. The attached goods were found in the house he owns hence I hold that this is prima facie evidence of ownership and ability to acquire those items. The burden shifts to the Plaintiff to demonstrate otherwise and its contention that there are no corresponding ETR receipts or that they do not bear stamp duty receipts is simply not enough to dislodge the Objector’s evidence. In addition, the Objector has shown that the motor vehicle registration KBN 271T belongs to him.
9. However, a copy of the records for motor vehicle registration number KBF 381U indicates that it belonged to the 2nd Defendant and not the Objector at the time of attachment. The Objector has not



demonstrated that it is entitled to or has a legal or equitable interest over this motor vehicle. I therefore find that motor vehicle registration number KBF 381U is available for attachment to satisfy the decree.

Conclusion and Disposition

10. For the reasons I have stated above, the Objector's Notice of Motion dated 6th August 2021 succeeds to the following extent:

a. The attachment against the household goods and motor vehicle registration number KBN 271T as set out in the proclamation dated 3rd August 2021 be and is hereby raised.

b. For avoidance of doubt, execution in respect of motor vehicle registration number KBF 381U shall proceed.

c. The Plaintiff shall bear half the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Ms Nekesa instructed by Musyoka Murambi and Associates for the Plaintiff.

Mr Omondi instructed by Arwa and Change Advocates LLP for the Objector.

