



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. CIVIL SUIT NO. 762 OF 2003

STEPHEN KIMANI KARUU T/A KIRIIYU MERCHANTS AUCTIONEERS.....AUCTIONEER/APPLICANT

AND

DEEKAY CONTRACTORS LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

CONSTRUCTION & CONSTRUCTING LIMITED.....DEFENDANT/JUDGMENT DEBTOR

HON. JOHN MATERE KERIRI.....OBJECTOR

RULING

1. The objector herein, Honourable John Matere Keriri, filed notice of motion dated 28th March 2019 seeking the following orders:

1. Spent

2. That pending the inter parties hearing of this application, there be stay of execution of the decree against the objector or any of the objector's properties or assets.

3. That Lady Justice Nzioka recuse herself from this matter.

4. That the application dated 15th March 2019, and which was certified as urgent by this Honourable Court, be heard and determined by a judge other than Lady Justice Nzioka.

5. That the directions given by Lady Justice Nzioka in the said application on 27th March 2019 be vacated, and the application be determined on the basis of the law as enacted and/or contained in Order 22 Rule 54 of the Civil Procedure Rules.

6. That in the absence of a replying affidavit from the attaching creditor challenging the facts stated in the said application, the application dated 15th March 2019 be allowed as prayed.

2. The application is supported by the objectors affidavit sworn on 28th March 2019 wherein he avers that the directions given by Lady Justice Nzioka on 27th March 2019 contravene Article 10 of the Constitution which commands the court to apply the Rule of Law in the adjudication of disputes and that Justice Nzioka failed to follow the rule of law as enacted in Order 22 Rule 54 of the Civil Procedure Rules in issuing the said directions.

3. The objector contended that it is contrary to the law to compel a party, other than a judgment debtor to pay a judgment debt in the absence of a decree or order of the court to that effect. The application dated 28th March 2019 was preceded by an earlier application dated 15th March 2019 in which the same objector seeks the following orders:

1. A declaration that the objector is not a judgment debtor in this suit, and there is no order for attachment of the objector's goods in execution of the decree herein.

2. A declaration that the payment made by the objector to the court broker under duress or coercion in order to stop attachment of the objector's goods by the court broker was and is unlawful.

3. A declaration that the purported execution of the decree herein against the objector is null and void.

4. That there be stay of execution of the decree against the objector or any of the objector's properties or assets.

5. That the sum of Kshs 1, 000, 000, 00 unlawfully paid by the objector to the court broker under duress be refunded to the objector.

6. That the post dated cheques issued by the objector to the court broker be returned to the objector forthwith.

4. The application is similarly supported by the objector's affidavit and is premised on the grounds that the objector is not a judgment debtor and is not liable to pay the decretal sum in the suit.

5. The objector avers that he was, on 26th February 2019, confronted by a group of 13 people accompanied by 4 police officers who informed him that they had court an order allowing them to attach his motor vehicle registration Number KAR 263E. He attached a copy of the log book for the said car to the supporting affidavit as annexure marked "JMK1".

6. He further states that the auctioneers also threatened to attach his office equipment and that no amount of explanation could make the auctioneers relent thereby leaving him with no choice but to part with kshs 1 million under duress/coercion and to issue post-dated cheques as follows:

Date	Cheque No.	Amount	Drawer
31/03/19	000366	900,000	John Matere Keriri
30/04/19	000367	900,000	John Matere Keriri
30/05/19	000368	900,000	John Matere Keriri
30/06/19	000369	900,000	John Matere Keriri
30/07/19	000370	900,000	John Matere Keriri
30/08/19	000371	900,000	John Matere Keriri
30/04/19	000373	500,000	John Matere Keriri

7. The objector avers that it was only after he parted with the money and post-dated cheques that the auctioneers released his motor vehicle and office equipment. He adds that he thereafter wrote to his lawyers to explain the whole ordeal to them as shown in annexure marked "JMK2".

8. At the hearing of the 2 applications Mr. Wananda, learned counsel for the objector, submitted that the property that the auctioneer attached belong to the objector and that under Section 44 of the Civil Procedure Act, only the property of the judgment debtor can be attached in execution of a court decree. Counsel explained that the only time the property of a third party can be attached are under Section 92 of the Civil Procedure Act on attachment against a surety with the leave of the court and where the corporate veil is lifted, with the leave of the court.

9. Counsel submitted that in the instant case, the objector has demonstrated that the auctioneers moved to attach his motor vehicle and that the respondent did not file any replying affidavit to challenge the averments contained in the objector's affidavits.

10. Counsel maintained that the application is not *res judicata* as alleged by the decree holder as this is the first time that the objector is raising the issue of the attachment of his property. He argued that the objector issued cheques in settlement of the decretal sum under duress and coercion and that the objector had taken the earliest opportunity to approach the court for redress.

11. Counsel argued that the objector and the judgment debtor are two separate entities. He relied on the decision in the case of **Omega Enterprise Ltd -Vs- Kenya Tourist Development Corporation & 2 Others Civil Appeal No. 59 of 1993** for the argument that the purported execution of the decree against the objector was null and void.

12. The Respondent/Decree holder opposed the application dated 15th March 2019 through Grounds of Opposition dated 27th March 2019 in which it listed the following grounds:

1. The objector's notice of Motion dated 15th March 2019 is clearly misplaced for being overtaken by event; it is an afterthought and an academic exercise and, therefore, an abuse of the court process.

2. The objector's notice of motion aforesaid breaches the principle of law on finality to litigation and/or judicial proceedings.

3. That said application is, therefore, unmerited and an abuse of the court process.

4. In the circumstances therefore, the objector's application is frivolous, vexatious, does not lie in law and is for dismissal.

13. Through its written submissions filed on 29th April 2019, the decree holder set out a detailed chronology of events that include a series of previous applications and a constitutional petition filed by the defendant in court immediately the arbitral award was made in favour of the decree holder which, he alleged, were intended to obstruct and frustrate the decree holder's realization of the decree. He stated that the said applications were all unsuccessful. It was submitted that pursuant to break-in orders issued by the court allowing auctioneers to enter into defendants premises in order to execute the decree, the auctioneers proceeded to the judgment debtor's premises where the objector paid Kshs 300,000 in partial settlement of the decree and issued the said auctioneers with post dated cheques for the total sum of Kshs 5,900,000/- towards full settlement of the decretal sum.

14. At the hearing of the application, Mr. Kihiko, learned counsel for the decree holder submitted that there is no proper objection before court as the objector did not prove that proclamation or attachment of either movable or immovable property had taken place.

15. Counsel submitted that proper execution of a valid court order took place on 28th February 2019 and that objector herein, who is the Managing Director of the judgment debtor, made cash payments and issued post dated cheques in settlement of the decretal sum. Counsel noted that the objector also made a written undertaking in a letter dated 28th February 2019 addressed to the High Court Registrar to the effect that execution of the decree would ensue for the entire balance of the decretal sum should any of the post-dated cheques be returned unpaid.

16. It was therefore the decree holder's case that the decree had been perfected in view of the objectors undertaking and that since none of the post dated cheques had been returned; the court had become *functus officio* in the matter. For this argument counsel relied in the decision in the case of Jersey Evening Post Ltd -Vs Al Thani (2002) JLR 542 where the court summarized the principle of *functus officio* as follows:

"A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision had been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are fully concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

17. It was submitted that the instant application is an afterthought and an abuse of the court's process as the Managing Director of a company cannot issue cheques to settle a debt on behalf of the company and then turn around to claim coercion.

Analysis and determination

18. I have considered the two applications (dated 15th and 29th March 2019) filed by the objector herein and the Grounds of Objection filed by the decree holder together with the submissions made by the parties respective counsel. The main issue that falls for determination is whether the objector is entitled to the orders sought in the applications.

19. Starting with the application dated 28th March 2019, one can say that the said application has been overtaken by events as it mainly sought orders for the recusal of Lady Justice Nzioka from this case. It is clear that the matter is no longer before Justice Nzioka and I will now turn and consider the prayers sought in the earlier application dated 15th March 2019.

20. The gist of the said application is to reverse the payment that the objector herein has already made to the decree holder in settlement of the decretal sum on the basis that; firstly, the payments were made under duress and coercion in order to forestall an attachment of the objectors property and secondly; that the objector is not the judgment debtor.

21. In a nutshell, the objector seeks a refund of the money that he has so far paid in settlement of the decree and further, that the post dated cheques be returned to him.

22. In determining this application, I find that it is important to highlight the undisputed facts of the case. It was not disputed that the objector is the Managing Director of the defendant/judgment debtor herein. It was also not disputed that the judgment debtor had a long standing dispute with the decree holder that was punctuated by numerous applications and culminated in execution of a decree. It was further not disputed that the objector herein took it upon himself to settle the said decree in his capacity as the Managing Director of the Judgment Debtor. The objector's claim is that he agreed to settle the decretal sum under duress and coercion so as to avoid the attachment that had been levied against his property.

23. My finding is that strictly speaking, the instant application cannot be construed to be objection proceedings within the meaning of Order 22 Rule 51(1) of the Civil Procedure Rules 2010, which stipulates as follows:

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 this 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.”

24. Under Rule 52, the objector is entitled to an automatic stay of execution upon complying with Rule 51 and under Rule 53, if the judgment creditor after receipt of notice of objection to attachment fails to reply to the court within the period prescribed by the Notice the attachment shall be raised.

25. In the present case, it is not in doubt that in lodging the application, the objector did not comply with the procedure provided for under the above cited Rules. Furthermore, it is trite law that he who alleges must prove the allegations. In the instant case, the objector has not demonstrated by way of any tangible evidence that any attachment was levied against his property so as to entitle him to approach this court as an objector or that he was coerced, to settle the decretal sum against his wish. No material was placed before this court to show that the objector took any immediate concrete measures to report the alleged coercion to the relevant authorities or even to the court for appropriate action. It is noteworthy that the objector filed the first application on 15th March 2019, more than 2 weeks after the date that he was allegedly coerced to pay the decretal sum thereby leading to the irresistible conclusion that the instant application may have been an afterthought and thus, lending credence to the decree holder's contention that the objector is hell-bent on standing in the way of its realisation of the fruits of the decree. My take is that if indeed the objector was coerced into issuing the post-dated cheques, nothing would have been easier than for him to take immediate remedial steps to inform the bank to stop the payments.

26. It is trite law that litigation must come to end and in this case, I find that litigation ended the moment the applicant agreed to settle the decretal sum thereby rendering this court functus officio. In the case of **William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** the court observed that:

“The philosophy behind the principle of *res judicata* is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

27. In conclusion, I find that the instant applications are not merited and I dismiss them with costs to the decree holder.

Dated, signed and delivered in open court at Nairobi this 13th day of June 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Akello for Wananda for the objector

Mr. Gachura for the decree holder

Court Assistant - Ali