



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 876 OF 2009

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

KAPU (KENYA) LIMITED.....DEFENDANT

RULING

1. Judgment was entered on **19th July 2018** in favour of Diamond Trust Bank Limited (the Plaintiff) as against KAPU (Kenya) Limited (the defendant) for Ksh 6 Million together with interest and costs. In execution of that judgment the plaintiff instructed an auctioneer, upstate Kenya Auctioneers to attach moveable goods of the defendant. On obtaining the warrants of attachment the auctioneer on 28th June 2019 proclaimed the following items of goods:

-Office chair

-Office table

-Photocopy machine

-complete computers

-Assorted lubricants

-Assorted iron bars

-Motor vehicle Registration No. KBZ 585 B

-Motor vehicle Registration No. KAY 131 B

2. By Notice of Motion dated 3rd June 2019 Nikisuhi Investment Limited (the objector) objects the aforesaid proclamation and seeks a declaration that the attached goods belong to it and not to the defendant. The application is supported by an affidavit of Manish Shah the manager of the objector. He stated that because the objector is not a party to this case there cannot be execution levied against its goods in respect to the defendant's debt.

3. The application is opposed by the plaintiff replying affidavits of the plaintiff's debt Recovery officer and the affidavit of Joseph Kahoro Mundia the auctioneer. The auctioneer by that affidavit stated that its proclamation was served on the defendant at its known place of business. By the affidavit of the Debt Recovery Officer's the plaintiff stated that the objector's application is incompetent for having been filed by an advocate without a current practising certificate.

ANALYSIS

4. An objector to an attachment is required to prove entitlement to or to have legal or equitable interest in the attached goods –see Order 22 Rule 51 of the Civil Procedure Rules.

5. In the application before me the objector stated, by the affidavit in support of the application, that the attached goods belong to it. Other than that bare statement the objector did not elaborate what its claim is over the attached goods. The burden of proof was on the objector to prove either equitable or legal right over the attached goods. This is what was stated in the case **KENNEDY NJUGUNA MWANGI V**

“It is clear therefore that the Objectors must produce evidence of the legal and/or equitable interest in the whole or part of any property attached in execution of decree (see, Akiba Bank Ltd v. Jetha& Sons Ltd(2005) eKLR). Basically, therefore the burden of proof is on the Applicants to establish ownership (see also Chatabhai M. Patel & Another HCCC No. 544 Of 1957 (Lewis) On 8/12/58 HCU (1958) 743).

52. Further in the case of Zingo Investment Limited v Miema Enterprises Limited [2015] eKLR, the Court had this to say:

“It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the attached goods. If this were not the case landlords may well become objectors whenever a tenant’s goods are proclaimed and this cannot be the law. (See Nairobi HC Misc. Civil App. No 802 of 2010Arun C. Sharma -v- Ashana Raikundalia t/a A.R. Raikundalia & Co. Advocates & others).”

6. The objector failed to prove its entitlement or ownership of the goods attached, listed above (except the two Motor vehicles owned by other third party).

7. Was the objector’s application incompetent for having been filed by an advocate without a practising certificate. That issue was conclusively decided by the Supreme Court in the case **NATIONAL BANK OF KENYA LIMITED V ANAJ WAREHOUSING LIMITED (2015)eKLR** where the court discussed the provisions of section 34(1)(a) of the Advocates Act. The Supreme Court began by identifying the issue for determination as follows:

“The main issue for determination is:

whether a document or instrument of conveyance is null and void for all purposes, on ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act.”

The Supreme Court then made the following finding:

“[68] The facts of this case, and it’s clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

[69] While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

8. It is clear from the above that the objector’s application is not incompetent by the mere fact it was filed by an advocate without a current practising certificate.

CONCLUSION

9. In the end, and in view of the above finding that the objector failed to prove entitlement to or to have legal or equitable interest in the attached goods the Notice of Motion dated 3rd June 2019 is dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT