

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 196 OF 2015

MIDDLE EAST BANK KENYA LIMITEDPLAINTIFF/DECREE HOLDER

VERSUS

SUNDIP PATEL1ST DEFENDANT/JUDGMENT DEBTOR

AND

HINA PATEL1ST OBJECTOR/APPLICANT

JAGDISHROY M. PATEL.....2ND OBJECTOR/APPLICANT

RULING

1. To appreciate the basis of the several applications herein, it is important to lay the historical background of this matter. The Plaintiff commenced this suit vide a plaint dated 21st April 2015. The same was served upon the Defendant and a memorandum of appearance filed on 17th June 2015. On 14th September 2015, the Plaintiff filed a notice of motion application dated 9th September 2015, seeking for Judgment against the Defendant. It was heard and determined on 12th October 2016, where by Judgment was entered against the 1st Defendant, as prayed for in the plaint. No judgment was entered against the 2nd Defendant.

2. On 15th November 2016, the 1st Defendant filed a notice of motion application dated 14th November 2016, seeking for inter alia, stay of execution and/or setting aside of the judgment. On 10th November 2016, an application dated 9th November, 2016 was filed; Hina Patel and Jagdishroy M. Patel; as Objectors, seeking to stay the attachment and sale of their property as described in the proclamation dated 5th November 2016. Before that application was heard and determined, the Plaintiff filed a notice of motion application dated 2nd October 2017, seeking to strike out the notice of motion application dated 9th November 2016, for being an abuse of the Court process.

3. On 14th March 2017, the Objectors filed another notice of motion application of the even date, seeking to stay the warrants of attachment issued by the Deputy Registrar and sale of their attached property. On 5th April 2018, the Auctioneer by the name of; Joseph Kahoro Mundia t/a Upstate (K) Auctioneers filed an ex parte application seeking for an order that the OCS Kileleshwa Police Station be ordered to accompany him and keep peace to enable him remove the goods proclaimed and held at the premises of the 1st Objector. That application was considered by the Honourable Deputy Registrar and allowed in terms of prayer (2) and (3).

4. On the 21st May 2018, the Objectors filed yet another notice of motion application dated 20th May 2018, seeking for similar orders as those sought for in the applications dated 9th November 2016 and 14th March 2018. Similarly a third objector's notice of motion application dated 24th March 2018 was filed by an Objector, one Kirani Patel on 25th May 2018. On 31st May 2018, the Decree Holder filed a notice of motion dated 30th May 2018, intimating the intention to proceed with execution.

5. As can be noted from the foregoing, a total of eight (8) applications have been filed in this matter. The one dated 14th September 2015, seeks for entry of Judgment and the one dated 5th April 2018, filed by the Auctioneer have been dealt with and determined. The other three applications dated 9th November 2016, 14th March 2018 and 20th May 2018 were filed by the 1st and 2nd Objectors seeking for similar orders.

6. The last application is premised on the same provisions as those cited in their first applications of 9th November 2016 and 14th March 2018, and seeking for the same orders as sought for in the earlier application save that, two other prayers were sought for as follows;

(a) The warrants of attachment and sale issued by the Deputy Registrar on the 7th March 2018, be stayed on interim basis pending the determination of the application dated 9th November 2016;

(b) The Auctioneers be restrained by way of interim injunction from executing the proclamation notice or in any other way from interfering with the Objectors/Applicants properties pending inter parties hearing of the application.

7. In my considered opinion, the applications filed on 14th March and 20th May 2018, be and are struck out for being an abuse of the court process. The only application by the 1st and 2nd Objectors that will be heard is the one dated 9th November 2016.

8. However, as stated herein the Plaintiff/Decree holder filed the application dated 2nd October 2017, seeking to strike out the notice of motion application dated 9th November 2016, for being an abuse of the court process and the costs thereof be awarded to the Plaintiff/Decree holder. The application was supported by the grounds on the face of it and an affidavit sworn by Tom Onyambu, an Advocate of the High Court practicing in the Law firm of; Nyaundi Tuiyott and Company Advocates, representing the Plaintiff/Respondent.
9. He deposed that, subsequent to the directions given by the court on the application dated on 9th November 2016, more particularly on the filing and the service of the responses and submissions, the Objectors/Applicants did not file their submissions as directed by the court. That, notwithstanding the same, the Plaintiff/Respondent filed its submissions and on 2nd February 2017, when the matter was before court, the Objectors/Applicants were not in Court. The matter was fixed for mention on 18th July 2017 and again despite notice of the mention, the Objectors/Applicants did not attend court. As such, their conducts indicate that they have lost interest in the matter and will suffer no prejudice if the same is struck out. The Plaintiff/ Respondent relied on the overriding objectives under the Civil Procedure Act to argue that matters should be heard and disposed of expeditiously.
10. However, the application was opposed by the Objectors/Applicants through an affidavit sworn by their lawyer Edward Mutali Wanyama, an Advocate of the High Court practicing as such in the name and style of; M/S Mutali Wanyama & Company Advocates who represents the 1st and 2nd Objectors/Applicants. He deposed that, when the matter came up for hearing on 2nd February 2019, he was engaged in Kisumu in another matter and instructed an Advocate by the name of John Otieno to hold his brief. That the Advocate agreed and/or covenanted to hold his brief.
11. That he trusted the Counsel would hold his brief. On the following day he followed up with the Counsel to ascertain the state of proceedings and he was informed that he would dispatch a write up on the state of the matter. A follow up on the same did not yield any fruits and when he perused the court file, he discovered that, the Counsel did not appear in court and the court directed that a further date should be taken in the registry for the mention of the matter.
12. He argued that it was incumbent upon the Plaintiff/Decree holder to invite the Objectors/Applicants to fix an appropriate mention date, but the Decree holder proceeded to fix an ex parte date on 18th July 2017 and failed and/or neglected to serve the Objectors/Applicants. That the purported service of a mention notice upon the Applicants is factually true, as it is not stamped, signed and/or dated. The counsel averred that he was duped by his colleague to believe that he would attend court and hold his brief.
13. Thus the failure to attend court was caused by inadvertent and honest but mistaken belief founded on the promise and undertaking on the part of the retained Counsel. It is excusable and should not be visited on the innocent litigants. That the Objectors/Applicants have a credible claim, so far as the proclaimed goods are concerned and are keen to pursue the Objectors proceedings. The provisions of Article 159(2) (d) of the Constitution of Kenya 2010 were relied on.
14. I have considered the arguments by the parties on the application dated 2nd October 2017, and I find that the explanation offered by the Objectors is reasonable and I disallow the application dated 2nd October 2017, and allow application dated 9th November 2016, to be heard. That paves way for determination of the Application dated 9th November 2016.
15. The notice of motion application dated 9th November 2016, is brought under the provisions of; Order 22 Rule 52, 51 Rule 1, 2, 3 and 4 of the Civil Procedure Rules (herein “the Rules”), Section 1A, 1B, 3A and 34 of the Civil Procedure Act, Article 159 and 162 of the Constitution of Kenya 2010, and all the enabling provisions of the law.
16. The application is supported by the grounds on the face of it and an affidavit of the same date sworn by Hina Patel, the 1st Applicant herein. The Applicants are seeking for orders that;
- (a) *The Honourable court be pleased to declare and/or pronounce that the assorted goods and/or items, at the foot of the proclamation notice dated 5th November 2016 and issued by M/S Upstate Kenya Auctioneers (sic) in execution of the decree of the Honourable court issued on the 2nd November 2016 belongs to the Objectors/Applicants and not otherwise;*
 - (b) *Consequence to prayer (a) herein above being granted, the Honourable court be pleased to discharge, vary and/or rescind the attachment of the assorted goods (details in terms of prayer (a) hereof), vide proclamation notice dated 5th November 2016;*
 - (c) *Costs of the application, together with the Auctioneers charges if any, be borne by the claimants/Decree holders and the nominated Auctioneer;*
 - (d) *Such further and/or other orders be granted as the court may deem fit and expedient.*
17. The Applicants aver that, they are the sole legal and equitable owners of the assorted goods proclaimed from the premises and/or residence of the Respondent/Judgment debtor. That the Judgment debtor is a distinct and separate entity from them. Further the 1st Applicant avers that, she was discharged from the subject proceedings vide a ruling dated 12th October 2016, where the court found that, she had no liability thereby dismissing the application seeking for summary judgment against her and judgment entered against the 1st Defendant/Judgment debtor.
18. As such, no execution can issue against her, nor her goods executed and/or attached in execution of the decree herein. Therefore the purported attachment of her goods constitutes and amounts to trespass and/or conversion. It is thus irregular, illegal and void. She further averred that the motor vehicle registration number KBC 555M, proclaimed belongs to the 2nd Applicant, her father in-law, as supported by an affidavit sworn the 2nd Applicant, Jagdishroy M. Patel, to the effect that, he is the owner of the subject motor vehicle and that he gave it to

her to use due to his health which resulted in his disabled state and inability to use due its complexity.

19. That, as regards the other proclaimed goods, she purchased them with the sum of; USD 6,000 received from one Mr. Khan Imran on 1st July 2009, in repayment of a loan she advanced to him of USD 12,000 on 10th May 2006. On the 15th day of April 2016, she was paid the balance and used the entire USD 12,000 to purchase the subject goods. The 2nd Applicant too averred that, he obtained a loan facility from Jamnadass Hire Purchase Limited, to purchase the subject motor vehicle. Both Applicants prayed that the application be allowed and the proclamation and the attachment of their goods be set aside.

20. However, the Plaintiff/Decree holder filed a Replying affidavit dated 30th May 2018, sworn by Elizabeth Ong'are, its officer in the Credit Administration Department. She deposed that upon the proclamation levied by the Decree holder's Auctioneers on 5th November 2016, the Objectors file a series of Applications as herein indicated, but did not take any steps to prosecute the same, culminating in the Decree holder's Application to strike out the first Objectors application dated 9th November 2016.

21. That the conduct of the 1st and 2nd Objectors, of filing multiple motions Applications and the fact that the same counsel acting for the elusive Judgment debtors is retained by the Objectors strongly point to an abuse of the court process by these Objectors so as to defeat the end of justice. Further the Judgment debtor and the 1st Objector are not disclosing that, they are husband and wife and both reside in the same premises at DikDik Gardens, where the subject goods were attached. Further, the 1st nor 2nd Objectors/Applicants have not established that, they hold equitable or legal ownership of the attached properties as per the Replying affidavit filed on 15th November and submissions filed on 18th July 2018.

22. However the Objectors filed a further affidavit dated 10th July 2018, sworn by Hina Patel, the 1st Objector/Applicant where she conceded that, she filed the Application dated 9th November 2016 ,but argued that although the court directed that the status quo be maintained pending the hearing and determination of the same, and there being no orders to the contrary, the Plaintiff/Decree holder herein is in clear contempt of the court orders, as it moved to proclaim and attach the Applicants goods while the status quo order was in force. Further the relationship of the Defendant/Judgment debtor and 1st Objector/Applicant does not in any way limit her rights as an Objector.

23. The parties disposed of the application vide written submissions. The objectors Objectors/Applicants filed their submissions dated 4th July 2018, and the Plaintiff/Decree holder filed the first set of submissions dated 9th October 2018 on the application dated 9th November 2016 and 14th November 2016, and the second set of submissions of the same date on the application dated 24th May 2018.

24. I have considered the Objectors application and I find that the main argument advanced is that, they do not owe the Plaintiff/Decree holder any money as they were not party to the suit that gave rise to the decree under execution. Indeed in an application of this nature, the burden of proof of legal and/or equitable ownership of the subject goods lies on the claimant/Applicant. The goods that were proclaimed herein are as per a proclamation of attachment and repossession of movable property issued by Upstake Kenya Auctioneers under the Auctioneers Act (No.5 of 1996) Laws of Kenya dated 5th November 2016.

25. From the list thereof, it is evident that they are pure household goods comprising of sofa sets, tables, dining chairs, stools, carpets, electronic systems; (home theatre, music, Dstv recorder, cooker and fridge). I have considered the documents produced in prove thereof and found only two documents annexed to the affidavit in support of the Application. The first document is an invoice No. 05/KDFGO02183 marked as "HP-1" in relation to four items as here below shown:-

No	Description	Quantity	Unit price	total
	Veria Recliner sky blue fabric seater	8	22,000.00	22,000.00
	Mahogany Brown dining 8 chairs	1	10,000.00	10,000.00
	Black metal dining table	2	3,000.00	3,000.00
	Glass table	1	5,000.00	5,000.00

Shipment details					
No.	Description	Qty	Units	Amount	CRN
1.	LCD Zec 48"TV			20,000.00	Dirhm

2.	Refrigerator Zec 2 door			10,000.00	Dirhm
3.	Cooker Zec 4 barnner			10,000.00	Dirhm
4.	Food Processor Zec			5,000.00	Dirhm
5.	Vacuum Cleaner Zec			2,000.00	Dirhm

26. An analysis of these two documents vis-a-vis a notice of proclamation of attachment referred herein, reveals that; some of the goods proclaimed (i.e. carpets, stools, home theatre, side units, deep freezer etc) are not covered by the documents produced in proof of ownership of thereof. Further the two documents produced and/or relied on are clearly marked as invoices, and not receipts.

27. The Plaintiff/Decree holder submitted that these documents are mere invoices are not “receipts” and do not support or prove that the proclaimed properties belong to the 1st Applicant as it is apparent therefrom. Further invoice No. 2010061 clearly indicates, the Port of loading as Mombasa, which means that the invoice was not for goods imported into the country as claimed by 1st Applicant, Hina Patel. That no documents such as the bill of lading, payment import duty: Mombasa Port Release Order (MPRO) or inland Port Release Order (I.P.R.O), and the name of the clearing agent, have been produced to satisfy the court that, the goods attached by the Decree holder goods were indeed imported into the country by the 1st Applicant.

28. I have further analyzed the documents produced and I find that, whereas the first invoice relates to “one set of sky blue fabric 8 seater”, the proclamation shows two sets of ten and seven leather sofa sets. Similarly, whereas it shows one mahogany 8 dining chairs, the proclamation shows fourteen dining chairs. It is therefore evident that, there is no prove given to establish ownership by the 1st Applicant to the goods proclaimed by the Plaintiff/Decree holder and in the absence of receipts in support of the specific goods proclaimed to prove legal ownership by the 1st Applicant, the orders sought to restrain attachment thereof cannot be granted.

29. Even if the court was to give the 1st Applicant the benefit of doubt, in relation to the goods that have been mentioned in the invoices, it is evident that the 1st Applicant did not disclose material facts in the affidavit in support of the application that, she is related to the Judgment debtor as a spouse. This is informed by the fact that, when goods of the kind of a nature herein are proclaimed in execution of a decree against a spouse, and the other party claims ownership thereof, the presumption would be that, the goods belong to the judgment debtor and/or both spouses until otherwise proved by them.

30. In this regard I associate myself with the sentiments of *Ojwang J* in the case of; *Imperial Bank Ltd V Leisure Car Hire Tours & Safaris Ltd & 2 Others, Objector Sattara Jabene Malik [2011] Eklr* where it was held as follows;

“This Court takes judicial notice that goods held in a house occupied by Judgment Debtor presumptively belong to Judgment Debtor, or, where Judgment debtor has a spouse, to the said spouse, or to the two jointly. The exact position will be, as I also take judicial notice, best known to 2nd defendant and his spouse (the objector). This presumption bears significance, in terms of burden of proof in law. The plaintiff only has to show the existence of the presumptive position; then the evidential burden falls upon judgment debtor and the objector to provide the detailed evidence to confirm the true position. In this instance, the objector’s evidence is guarded and laconic, and certainly says little about her relationship to the defendant-judgment-debtors”

31. However, I find that, the log book produced in support of ownership of the motor vehicle KBC 555M clearly shows that the owner is Jagdishroy Patel. The Plaintiff/Decree holder submitted that, from the copy of records “annexture JP1”, it bears the name of the registered owner as “Jagdishroy Patel”. The 2nd Objector’s name is Jagdishroy M. Patel, while the Judgment Debtor’s name is Sundip Jagdishroy Patel. The name “Jagdishroy Patel” as appears on the copy of records is “common to both the Judgment Debtor and the 2nd Objector”. That in the absence of further documentation the copy of records JP1 does not preclude the ownership of the vehicle by the Judgment debtor Sundip Jagdishroy Patel.

32. It was further submitted that, the vehicle was found and attached at the Judgment debtor’s premises and prima facie the “Jagdishroy Patel” named in the copy of records as the registered owner of the vehicle refers to the Judgment Debtor. Further, the 2nd Objector claims at paragraph 5 of his affidavit that the attached motor vehicle KBC 555M was obtained through financing from M/S Jamnadas Hire Purchase Ltd, but no documentation has been availed to show the existence of the said loan.

33. However, with utmost respect to the Plaintiff/Decree holder, the legal ownership of a motor vehicle can only be proved through the records from the Registrar of Motor Vehicles. It is never proved through mere presence of an asset in a premise. Therefore, the argument stated above by the Plaintiff/Decree holder does not hold water. The 1st Applicant explained how she came to be in possession of the motor vehicle and the 2nd Applicant explained how he obtained the motor vehicle. Even if he got it free of consideration or even as a gift, the production of a logbook in his name suffices. I am therefore satisfied that the motor vehicle does not belong to the Judgment debtor and is therefore not available for attachment. It should be released forthwith unless otherwise lawfully held.

34. I have also considered the submissions by the Applicants. First and foremost, I find that they reiterate generally the factual and legal issues raised in the matter. They do not deal specifically with the issue of ownership of the property which the Applicants claim to own. This is evidenced by the fact that, the Applicants commence the submissions by reiterating the factual matters, the averments in the affidavits in support of the application, and alluded to the violation of the 1st Applicant's constitutional rights under Article 27 of the Constitution 2010. The Applicants then invited the court to "stand tall and defend" what is correct within realms of the law.

35. The Applicants averred that Section 3A of the Civil Procedure Act "demands" that courts do enter stay of proceedings where ends of justice so demand and referred to the case of; Tritex Industries Limited & 3 others vs National Housing Corporation & Another Civil Suit No.8 of 2011, dealing with principles of granting injunctions. Further reference was made to the case of; Stanley Ngether Kinyanjui Vs Tory Ketter & 5 Others (2005)Eklr

36. All in all I find that the 1st Objector has not proved the goods attached do not belong to her and I dismiss her application to restrain the Plaintiff/ respondent from attaching them.

37. However having dealt with that application, I noticed that the Defendant/Judgment debtor herein filed an application seeking to set aside the judgment on record and both parties have filed submissions thereto. The court was given the liberty to deal with the same. The Defendant/Judgment Debtor filed the submissions on 13th July 2013, and raised three issues for determination as follows:-

(i) *Whether the mistake was on the part of the Respondent/Judgment debtor?;*

(ii) *Whether the due process of court was followed in issuance of the warrants of attachment and sale?;*

(iii) *Whether the court could grant the orders as sought?*

38. It was submitted that; that the Plaintiff/decree holder herein has already recovered all the monies due and owing to it from both the Respondent/Judgment debtor and the Managing director then. Consequently, the plaint under reference seeking further payments is merely triggered by greed to defraud the Respondent/Judgment debtor herein. That where it is proved and/or established that the Plaintiff/Decree holder did not follow the due process of court, the Honourable court is enjoined to interrogate the due process.

39. The Judgment debtor/Respondent relied on the decision in the case of; Edward Kamau & Another vs Hannah Mukui Gichuki & Another (2015) eKLR, Misc. Application No. 78 of 2015. That similarly the decree under reference is defective by virtue of the provision of; Order 21 Rule 8 of the Civil Procedure Rules, 2010 Reference was made to the cases of; David Makay vs Maua Mutie Ndunda Civil Appeal No. 72 of 2004 (2017) eKLR

Eco Bank Kenya Limited vs Afrikon Limited HCCC Civil Case No. 121 of 2016 (2017) eKLR and Brian M. Lewela vs Boomlmat (EA) Company Ltd Industrial Case No. 223 of 2014.

40. The Plaintiff/Respondent submitted and invited the court to consider two issues;

(a) *Whether or not the ruling delivered on 12th October 2016 by Justice Fred A. Ochieng is binding?; and*

(b) *Whether or not the failure on the part of the Applicant's Advocate to approve the draft decree renders the decree null and void and thus non-executable?*

41. It was submitted that the issue of setting aside of judgment cannot arise at execution stage. That the 1st Defendant had opportunity to oppose the Plaintiff's application for summary judgment on its merit when the same came up for hearing on 7th June 2016 but made no appearance in person or by his Advocate despite the hearing date having been fixed by consent of the parties.

42. The court being satisfied that the hearing date was fixed by consent of the parties proceeded with the hearing of the application and being satisfied that this was a matter fit for summary determination entered summary judgment against the 1st Defendant. It is not a default judgment as contended by the 1st Defendant. It is summary judgment based on consideration of the merits.

43. That the procedural mechanisms for setting aside a judgment of the court need not be belabored here, that it suffices to point out that the Applicant has neither lodged an appeal or filed an application to review/set aside the ruling delivered on 12th October 2016, as such the same is binding and the Applicant's obligation is to satisfy the decree.

44. That notwithstanding, the Applicant admits that the draft decree was forwarded under the Plaintiff/Respondent's cover letter of 26th October 2016, to be amended or approved within seven (7) days thereof. The seven (7) days within which the amendment was to be returned was set to lapse on 1st November 2016. The Defendant/Applicant never returned the draft decree and no evidence whatsoever has been adduced to show that the same was returned to the Decree holder within the said prescribed time. It is clear that failure to have the decree approved by the counterpart is not fatal rather it is the Registrar's approval that is mandatory.

45. Further Order 21 Rule 8 of the Civil Procedure Rules allows the Registrar to sign and seal a decree if satisfied that the same is in accordance with the Judgment of the court. The Judgment debtor cannot therefore seek to stall execution when the decree was properly issued by the Registrar having satisfied that the decree was in consonance with the judgment.

46. That it must be borne in mind that the sole objective of; Section 94 is to shield a judgment debtor from multiplicity of executions from

the same judgment, thus it has been inferred that where the decree holder proceeds with the execution of the decree before the costs are assessed, it is deemed that the decree holder has waived costs. As held in the case of; Vincent Edward Njoroge vs Kenol Kobil Limited (2018) eKLR, the court stated:-

“Section 94 of the Civil Procedure Act envisages that if a decree holder wishes to proceed with execution before taxation, leave of court should be sought. Where in any case the decree holder proceeds with execution without leave of court, he is in effect intimating that he is waiving his right to costs.”

47. Moreover, in view of the objective of the Section 94, where there has been no compliance with the provision of the Section, the decree is not ipso facto voided but rather the court could stay the execution to allow for compliance as was held in the case of; Bullion Bank Limited vs James Kinyanjui & Park Enterprises Limited (2006) eKLR.

48. I have considered the argument on this application and I find that, upon service of the plaint, the Defendants filed their defence. Subsequently, the Plaintiff filed an application for summary Judgment based on the premise that the Defendants had no reasonable defense to the suit. The Application was heard and judgment was entered on 5th October 2016 against the 1st Defendant on 7th June, 2016. The Judgment was not entered on default of appearance and/or filing of defence. It was entered on admission of the debt. The principles in the case of; Patel vs E.A. Cargo Handling Services Ltd (1974) EA75 do not apply. Therefore, the available avenue is the filing of an application for review or appeal.

49. Be that as it were, the entire application for setting aside dwells on the stay of execution. No grounds or explanation has been offered why the Applicant did not respond to the application seeking for judgment and/or appeared for hearing thereof as stated. It is only stated in the submissions that the Applicant’s counsel forgot to diarize the matter.

50. Finally, the Applicant did not file the application on 14th November 2016, after judgment was entered on 12th October 2016. In fact, the Applicant avers that the Respondent’s counsel had sent the Applicant a ruling notice dated 5th October 2016; draft copy of the decree was filed on 1st November 2016. It is only upon the issuance of warrants of attachment after proclamation of the Objectors goods on 5th November 2016, that the Applicant filed the subject application on 14th November 2016. It is therefore evident the application is tainted with the breach of the doctrine of laches.

51. The upshot is that no reasons have been advanced to the satisfaction of the court to set aside the judgment. The Applicant is at liberty to appeal against the judgment. Application is thus dismissed with costs.

52. It is so ordered.

Dated, delivered and signed in an open court this 6th day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr Onyambu for the Plaintiff/Respondent

No appearance for the Judgment debtor/Respondent

No appearance for the Objectors/Applicants

Dennis -----Court Assistant