



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 53 OF 1996**

**NATIONAL BANK OF KENYA..... PLAINTIFF**

**VERSUS**

**RICHARD K. SEREM.....DEFENDANT**

**AND**

**MUSA SEREM.....1<sup>ST</sup> OBJECTOR**

**ELIZABETH CHEPKURUI.....2<sup>ND</sup> OBJECTOR**

**KIPTALAM SEREM.....3<sup>RD</sup> OBJECTOR**

**RULING**

1. The application dated 11<sup>th</sup> November 2011 and filed on the 15<sup>th</sup> November 2011 was brought by the the 1<sup>st</sup> Objector Musa Serem, but seems to be for himself and on behalf of the other two objectors Elizabeth Chepkurui and Kiplangat Serem.

An order to lift the attachment on land **Parcel No. Kericho/Koiyet/142** was sought. The grounds in support of the application are that the Objectors have beneficial interest in the family land that is registered in the name of Richard Serem and the Defendant and Judgment Debtor in the suit, whom they claim that his interest in the land parcel was only 5 Acres.

2. In his affidavit in support the 1<sup>st</sup> Objector Musa Serem depones that they are not parties to the suit and that their consent to charge the property was not obtained and did not know of the suit, that should the attachment not be lifted, they would suffer irreparable loss and damage.

3. The decree holder National Bank of Kenya filed grounds of opposition on the 8<sup>th</sup> December 2011 that the application is misconceived, incompetent and bad in law, that it is presented in collusion with the Judgment debtor and that the objectors interest in the suit land is only speculative, and referred to an affidavit sworn on the 14<sup>th</sup> October 2011 by one Samuel Odiyo, the decree holders Branch Manager.

4. The 2<sup>nd</sup> respondent has no objection to the application while the objectors brought on board the firm of Mirugi Kariuki & Company advocates to act for them vide a notice of appointment dated the 23<sup>rd</sup> January 2012 and filed on the 24<sup>th</sup> January 2012.

5. Parties filed written submissions on the application.

6. Brief facts leading to the objection proceedings are that the plaintiff herein obtained Judgment against the defendant when he defaulted in payment of a loan he had been advanced by the Bank, the plaintiff.

Upon the case being heard, judgment was entered for the plaintiff against the defendant in the sum of Kshs.145,025/= plus interest and costs. Thereafter the defendant by a consent undertook to pay the decretal sum and when he defaulted a prohibitory order was registered against the suit land **Parcel No. Kericho/Koyiet/142** Registered in the Defendants names.

Upon attachment of the property by the Bank after all procedural requirements were undertaken, the objectors filed the present application upon the grounds stated above.

7. In their submissions by Lawrence Karanja Advocate, it is the objectors contention that they have lived on the land parcel for many years, that the subject land is registered in the defendants names but as a trustee for them and other family members, that the defendant breached the trust by taking a loan on the land and that his share is only 5 Acres out of 49 acres.

The court has been urged to deem these objection proceedings as a suit under **Section 34(2) of the Civil Procedure Act** and determine issues framed as follows:

1. *Whether the Land Parcel is held in trust for the objectors by the defendant.*
2. *Whether the attachment should proceed*
3. *Whether these proceedings should be deemed as a suit.*

8. These are objection proceedings to attachment and sale of the property at stake which is registered in the defendants/judgment debtors name.

I have noted that the defendant did not defend the plaintiffs case and summary judgment was thus entered against him on the 30<sup>th</sup> July 2003. I have also seen the application for the subject loan to the bank where the defendant offered the Title Deed to the subject property to the Bank as collateral.

I have been referred to an affidavit sworn by the Nakuru Branch Manager of the Judgment Holder Mr. Samuel O. Odiyo on the 4<sup>th</sup> October 2011. In the said Affidavit, it is deponed that the Judgment Debtor was arrested and committed to Civil jail for three months on the 25<sup>th</sup> June 2010 and on the 1<sup>st</sup> July 2010 a consent order was recorded between the Judgment Debtor and the Decree Holder upon which he was released upon agreeing to pay the decretal sum. The consent was that his family was to sell part of the attached land parcel to clear the outstanding amount, but that was not done prompting the plaintiff to place a prohibitory order against the property.

It was further deponed that the objectors interests in the land Parcel were unknown and none had been placed before the court for adjudication. That was in 2011. To date the Judgment debtor has failed to honour the consent order or pay the decretal sum which continues to accrue interest.

9. I have considered submissions filed by the objectors.

**Section 44 of the Civil Procedure Act** states:

*(1) All property belonging to a judgment debtor including property over which or over the profits of which he had a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf shall be liable to attachment and sale in execution of a decree.*

Under the provisions of **Order 22 rule 51(2) of the Civil Procedure Rules**, an objector to attachment and sale is obligated to set out in brief the nature of the claim for the objection to the whole or portion of the property.

I have seen the Notice of Objection to attachment by the Objectors filed on the 5<sup>th</sup> October 2011. A copy of official search of the property **Kericho/Koiyet/142** is not annexed to confirm the current ownership.

The title was registered in the Judgment Debtor's name on 11<sup>th</sup> March 1987 and a certificate of Title issue to him. On the 11<sup>th</sup> March 1987 a caution was registered against the title. It was lodged by the 3<sup>rd</sup> Objector claiming beneficial interest. On the 3<sup>rd</sup> June 2011 a prohibitory order was registered against the title by the plaintiff herein.

10. The interests of the objectors as may be seen from the notice of objection are claims that the whole family of eight persons, their children and grandchildren all reside on the land parcel and that the Judgment Debtor's Share is 5 Acres while the 2<sup>nd</sup> Objector's share is 11 Acres and the 3<sup>rd</sup> Objector hears is 30 Acres. Other than stating their interests in the land, they have not substantiated as to how they are entitled to the shares shown while the land parcel is wholly registered in the defendants name. They have not stated what beneficial interests they claim nor have they attempted to demonstrate their said interests.

11. I have considered authorities cited by the Objectors in their submissions.

In **Harilal & Co. Vs. Buganda Industries Ltd (1960) EA 318**, what may be investigated in an objection claim is stated as:

*(1) whether on date of attachment the judgment debtor or objector was in possession or*

*(2) whether the court is satisfied that the property was in possession of the Objector on his own account or in trust for the judgment debtor.*

12. I have stated above that there is no demonstration by the objectors of any of the allegations they have thrown to the court. A party intending to ask a court to give an order in its favour ought to place all relevant material facts before the court for consideration. A statement like the ones stated by the objectors, in my considered view remains as such unless proved.

13. I am persuaded to agree with the Plaintiff/Decreeholder that the Judgment Debtor is colluding with the judgment debtor to defeat the execution process. I say so because when he was placed in civil jail in July 2010, he undertook to sell part of the property in consultation with his family to payoff the debt. Instead, when he regained his freedom, he did not do so. He moved to court by the objectors in these objection proceedings.

It is trite that when a party offers a property to secure or be a collateral to a loan or any financial facility, that property whether family land, matrimonial property or otherwise becomes a commercial property for sale to realise the loan amount and or a debt or decretal sum.

**See HCCC NO. 22 of 2015 David Nyanjui Njehia t/a Davis Academy & Another -vs- National Bank Ltd.**

14. Issue of trust has been raised by the objectors. Once again, no substantiation has been established as to how or when the trust was created and terms thereof. It has also not been established how the objectors are family and if so whose family and how if indeed it is so, the judgment debtor is the trustee and therefore registered as owner of the property on behalf of the family, and the objectors. Is there a Succession Cause filed in any court in respect of the property? How did the property get registered in the Judgment Debtor's names? Was he purchaser for value and if so from who? What is the objectors legal interest in the property?

These are pertinent indicators from which the court could infer, though from a distance, a trust. None were established.

**15. Section 107 and 108 of Evidence Act** places the burden of proof on he who pleads and asserts.

**Section 34(1) of the Civil Procedure Act** states that:

*“All questions in Objection proceedings are to be determined by the court executing the decree in the suit and not in a separate suit.”*

**Section 34(2) –**

*“that subject to any objection as to limitation or jurisdiction, the court may treat a proceeding under this Section as a suit, or suit as as proceeding if it is necessary.”*

16. I have considered issues in the main suit and in the objection proceedings. I do not find it necessary to consider them as a suit. The Judgment Debtor failed to defend the suit during which he would have probably brought out all the issues now being discussed in these objection proceedings. Those where not his intentions then. This buttresses the decree holders contention that these objection proceedings are an after thought in inclusion with the judgment debtor.

In its entirety, I find no plausible objections that could be said to be justifiable in any way.

17. I therefore come to the conclusion that the land **Parcel No. Kericho/Koiyet/142** is solely owned by the Judgment Debtor and not held in trust for the objectors or any other persons recognisable in law. Further, it is the courts finding that there is no basis upon which these objection proceedings could be ordered to proceed as a suit. Any issue touching on the suit ought to have been canvassed in the main suit and as I have stated the Judgment Debtor opted not to defend the suit. He cannot reopen the case by way of objection proceedings by the objectors whose interests have not been proved or demonstrated.

Consequently, the attachment proceedings may be progressed to finality unless otherwise ordered by the court.

18. For the above findings and reasons, I find the application dated 11<sup>th</sup> November 2011 without any merit. It is dismissed with costs to the Decree holder/plaintiff.

**Dated, Signed and Delivered this 19<sup>th</sup> Day of January 2017.**

**JANET MULWA**

**JUDGE**