



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 157 OF 2012

NGURE EDWARD KAREGAPLAINTIFF

VERSUS

YUSUF DORAN NASSIR.....DEFENDANT

KYOGA HAULIERS (K) LTD.....OBJECTOR

RULING

1. The Judgment in this suit was delivered on the 16th May 2014 in favour of the plaintiff against the Defendant, Yusuf Doran Nassir in the sum of Kshs.22,795,000/= plus costs and interest. In execution of the decree the Decree holder through his agents Messers Direct “O” Auctioneers, holding lawful warrants of attachment, descended upon the alleged Objectors – **Kyoga Hauliers (K) Ltd** goods at Old Port Reitz, Changamwe at Mombasa on the 14th August 2014, and proclaimed the objectors goods.

2. The **Objector, Kyoga Hauliers (K) Limited** took out objection proceedings and by its application dated 22nd August 2014 sought the following orders:

(1) *Spent*

(2) *That execution of the decree herein by Messers Direct “O” Auctioneers be stayed pending the hearing and determination of the application.*

(3) *That the purported attachment of the goods described in the proclamation of attachment of moveable properties dated 12th August 2014 and annexed hereto be raised.*

(4) *That the plaintiff be condemned to pay the costs of this application including the court auctioneers charges for the purported attachment upon grounds that:*

a) the attached goods belong to the objector and not to the judgment-debtor, who in any event died on the 12^h October 2006 well before the proceedings herein were commenced.

*b) In any event, the purported attachment is bad in law and of no legal effect for want of compliance with the mandatory provisions of **Rule 12 of the Auctioneers Rule, 1997.***

3. When the objection proceeds come up for hearing, the Decree holder sought leave to cross examine the deponent on his supporting affidavit and upon such leave being granted, the said deponent was duly cross

examined on his affidavit on the 8th February 2016. At the conclusion of the cross examination, Mr. Gekonga Advocate for the Decree holder informed the court that he was no longer interested in pursuing the case against the objector and sought an order to have the objectors vehicles and equipment released to them. The said order was thus issued and the proclamation lifted.

The objector however sought to have costs of the proclamation paid to the objector which the Decree Holder objected to vehemently.

4. The Decree holder objected to an award of costs to the objector on the grounds that it was not clear whether or not the judgment debtor was dead as no death certificate was produced, and further that the objector's affidavit raised issues that needed clarification. He urged the court to deny costs to the objector.

5. I have considered the proceedings leading to the proclamation of the objector's goods.

The judgment debtor as may be ascertained from the pleadings is one **Yusuf Doran Nassir**. The objector, upon whom execution was carried on is a limited liability company, **Kyoga Hauliers (K) Limited**. Legally, these are two different persons.

I have perused the court proceedings. I have not found any court order or even an application by the Decree holder, for lifting the veil of incorporation so as to bring out, and obtain orders against the directors of the objector – See **Salomon -vs- Salomon (1897) Ac 22** – where the relationship between a company and its members were defined. Even if the judgment debtor was one of the directors, a fact not established in this case, the company cannot be held liable as it is distinct and enjoys a separate legal personality from its members and directors.

It was incumbent upon the decree holder, and indeed its duty to do due diligence to identify the Judgment Debtor's attachable properties before ordering the illegal attachment.

6. It is well settled that in execution proceedings, only property of the judgment debtor is liable to attachment as provided under **Section 44(1) of the Civil Procedure Act, 2010** that states:

“All property belonging to a Judgment Debtor including property over which or over the profits of which he has 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.”

7. There was no basis upon which the Decree holder proceeded to execute the decree against the objector, as no nexus was established connecting the Judgment debtor and the objector. No doubt the Decree Holder conceded to the objection proceedings before the court could make a finding on the same. The objector participated fully in these proceedings, and in my view is entitled to costs.

Section 27 of the Civil Procedure Act states:

“---the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid ----- provided that the costs of any action, cause or matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

8. The Decree holder dragged the objector to court by proclaiming its properties without any sound basis. The objector spent time and resources to bring out the objection proceedings, and fully participated in the proceedings.

There is no basis upon which the court may deny the objector costs of the objection proceedings.

Section 27 of Civil Procedure Act above is candid. Costs follow the event.

For those reasons, the court directs that taxed and/or agreed costs of the objection proceedings be borne by the decree holder and payable to the objector.

Dated, signed and delivered in open court this 14th day of July 2016

JANET MULWA

JUDGE