



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 737 OF 2012

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

-VERSUS-

HYUNDAI NAIROBI MOTORS.....1ST DEFENDANT

GOER ENTERPRISES.....2ND DEFENDANT

EDWARD NZESYA MUTILANGI.....3RD DEFENDANT

ROBERT MUTILANGI.....4TH DEFENDANT

AND

HARON GUANTAI THURANIRA.....OBJECTOR

JOHN M. MBIJIWE T/A BEALINE KENYA AUCTIONEERS....INTERESTED PARTY

RULING

1. The Application before the Court is the Objector's Notice of Motion dated **8th July 2015** and filed on **9th July 2015** under certificate of urgency. It is expressed to be brought under the provisions of **Order 22 Rule 51** of the **Civil Procedure Rules**. The orders sought thereby, some of which have since been disposed of, are as hereunder:

That the application be certified urgent and heard on priority basis. (spent)

1. That the Objector be declared to be the lawful legal exclusive owner of the motor vehicle **KBA 284 A**.
2. That the attachment of the vehicle by the decree holder or its auctioneers, servants or agents or **M/s Bealine Kenya Auctioneers** be lifted forthwith.
3. That an order staying execution do issue pending the hearing and determination of this application. (Spent)
4. That the decree holder and the auctioneer **M/s Bealine Kenya Auctioneers** be ordered to pay the Objector **Kshs. 49,500/=** which sum of money they took from the Objector on **3/7/2015** but for which no receipt was issued.

5. **That the Auctioneer, John Mbiyiwe, be made a party to these objection proceedings. (Spent)**
 6. **That the costs of the application and of these objection proceedings be paid by the decree holder.**
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2. The application is based on the grounds set out therein and is supported by the Affidavit sworn on **8th July, 2015** by **HARON GUANTAI THURANIRA**, the Objector herein. The Objector also filed written submissions on 18th September, 2015 in support of his application.
 3. The brief background of this matter is that, in execution of the Decree issued herein on 14th November 2013, warrants of attachment and sale of the Defendants' movable property were issued on 20th February 2014 for execution by M/s Bealine Kenya Auctioneers. The said warrants were thereafter re-issued on various dates at the instance of Counsel for the Decree Holder, the last such re-issue being the warrants dated 26th June 2015 for Kshs. 19,552,166.70.
 4. It is apparent from the affidavit of the Objector that the Interested Party, **John Mbiyiwe**, trading as **Bealine Kenya Auctioneers** (hereinafter referred to as "the Auctioneers") proceeded to attach motor vehicle Registration No. KBA 284A on the 3rd July 2015 in the belief that the said motor vehicle belonged to the 2nd Defendant, a company associated with the 3rd Defendant, Edward Nzesya Mutilangi. It is that attachment that has precipitated the instant application.
 5. It is the contention of the Objector that he is the owner of the said motor vehicle. He avers that he bought the motor vehicle at a public auction, paid for it and thereafter obtained court orders vesting the ownership of motor vehicle in him. (Attached and marked HGT-2 is a copy of the Court Order)
 6. The Objector further avers that on 3/7/2015 the Auctioneers' agents confronted him at a car wash in Nairobi and demanded to take away the motor vehicle in attachment of the decree issued in this case, yet he is not a party thereto. That in spite of his protestations, the Auctioneers insisted on taking the motor vehicle away alleging that they had served the 3rd Defendant with a Proclamation on 26/06/2015. The Objector further asserted that the Auctioneers' agents demanded for the costs of the attachment and compelled him to pay a total of Kshs. 49,500 but refused to issue him with a receipt.
 7. In response to the application, the Interested Party, **JOHN M. MBIJIWE**, filed a Replying affidavit sworn on **19th August, 2015**. He also relied on his written submissions dated 3rd September, 2015 which he filed herein on 4th September, 2015. His case is that the Honourable Court issued his firm with warrants of attachment and sale against the Defendants jointly and severally. It is his assertion that he then traced and proclaimed for attachment motor vehicle registration number KBA 284A, having ascertained that it was registered in the name of Goer enterprises, the 2nd Defendant herein, and that the 2nd Defendant is a firm associated with the 3rd Defendant.
 8. In his written submissions he pointed out that to date the motor vehicle is still registered in the name of the 2nd Defendant and that no explanation has been given as to why the Objector has not transferred the motor vehicle into his name four years after the alleged purchase. On the basis of the decisions in **High Court Misc. Civil Application No. 802 of 2010: Arun C Sharma vs. Ashana Raikundalia t/a A Raikundalia & Co. Advocates & Others** and **Nyeri Civil Appeal No. 192 of 1996: Thurania Karauri vs. Agnes Ncheche**, the Objector urged the court to find and hold that proof of ownership of a motor vehicle is in the logbook or certificate of official search duly signed by the Registrar of Motor Vehicles.
 9. He denied the Objector's allegations to the effect that his agents had confronted the Objector at a car wash and demanded money from him. He averred that neither himself nor his agents had received from the Objector the alleged sum of **Kshs. 49,500/=** or any sum at all.
 10. It was further the interested party's case that he had been unprocedurally enjoined to the proceedings bearing in mind the provisions of **Order 22 Rule 51 (1) of the Civil Procedure Rules** as read together with **Rules 52, 53 and 54** of the said Order. In the circumstances foregoing, the interested party urged the Court to strike out his firm from the suit with costs.
 11. The court has carefully considered the parties' submissions against the backdrop of their averments in their respective affidavits and the applicable law. Under **Order 22 rule 51** of the **Civil Procedure Rules** a person claiming to have a legal or equitable interest in property attached

in execution of a decree may give notice in writing of his objection to the attachment of such property. A notice to that effect was filed herein by the Objector on 9th July 2015 along with the objection application as required under **Order 22 Rule 51(2) of the Civil Procedure Rules**. The Affidavit of Service sworn by **Rose Ndinda** on 16th July 2015 and filed herein on 17th July 2015 confirms that both the Notice of Objection to attachment and the Notice of Motion filed therewith were duly served upon the firm of **Muriu Mungai & Co. Advocates** on behalf of the Decree Holder as well as the Auctioneers. There appears to be no intimation on the record from the Decree Holder's advocates of their intention to proceed with the attachment and execution or otherwise, as required by Order 22 Rule 52. Consequently, the attachment ought to have been lifted forthwith pursuant to Order 22 Rule 53 of the Civil Procedure Rules. It appears that instead of taking that route, Counsel for the Objector opted to take the longer route of prosecuting the objection application, which clearly was unnecessary. Accordingly, the Interested Party was somewhat justified in complaining that that he ought not to have been dragged into the proceedings, and that the contemplated respondent in an objection proceeding ought to have been the attaching creditor. Nevertheless, the court finds nothing in the provisions of Order 22 that were cited by the Interested Party to support this argument, indicating that an auctioneer cannot be joined as a party to Objection proceedings, noting that the auctioneer herein was not joined as a respondent but as an interested Party. To the contrary, **Order 22 Rule 51(1) of the Civil Procedure Rules** states that:-

“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.”

It is evident therefore that, besides the Decree Holder, an Objector can bring on board all the parties including an auctioneer in his objection proceedings if such joinder is necessary for the adjudication of the issues in controversy. I therefore disagree with the Interested Party that he was unprocedurally joined in these objection proceedings.

12. In the light of the foregoing, the main issue for determination in the current application is whether the Objector has demonstrated on a balance of probabilities that he has legal or equitable interest in the subject motor vehicle registration number KBA 284 A and therefore whether he is entitled to the orders sought. (See **Akiba Bank Limited vs Jetha & Sons Limited [2005] eKLR**)
13. Whereas the Interested Party contends that he had recourse to the Motor Vehicles Register pursuant to **Section 8** of the Traffic Act, Chapter 403 of the Laws of Kenya, and thereby satisfied himself that the motor vehicle belonged to the 2nd Defendant, it is well settled that such evidence of ownership is rebuttable. In the case of **NANCY AYEMBA NGAIRA VS. ABDI ALI CIVIL APPEAL NO. 107 OF 2008 [2010] eKLR** Ojwang, J (as he then was) observed thus:

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle and so the Act has an opening for any evidence in proof of such differing ownership to be given...”

14. The Objector claims ownership of the subject vehicle on the basis that he bought it at a public auction conducted by Wright Auctioneers on 27th August 2011 at Pangani Auction Centre. The documents annexed to the Objector's application confirm that the subject motor vehicle was sold to the Objector by way of public auction and that he paid valuable consideration for the motor vehicle in the sum of Kshs. 310,000. Some of the documents exhibited by the Objector are a copy of the proclamation and a copy of the Notification of sale issued by Wright Auctioneers as proof that the motor vehicle was indeed sold to the said Auctioneers by way of public auction. **Section 58 (1) (b)** of the **Sale of Goods Act** does recognize that a sale by auction is complete when the

- auctioneer announces its completion by the fall of the hammer, or in any other customary manner.
15. The Objector has further demonstrated that he later received a **vesting order** from the Chief Magistrate's Court dated 29th January 2015, vesting the ownership of the motor vehicle in him. The said Court also made an order for the Registrar of Motor Vehicles to transfer ownership of the motor vehicle to the Objector and issue him with a new logbook. There is no indication that that Order, issued by a Court of competent jurisdiction, has been challenged or set aside. It is evident therefore that the Objector herein acquired a valid legal title to the subject motor vehicle at a lawfully held public auction long before its purported proclamation and attachment by Bealine Auctioneers. More importantly, the said motor vehicle having already been previously sold by way of public auction and was in the possession of the Objector as the legal and beneficial owner, was not available for attachment. What remains is a matter of procedure for his name to be registered with the Registrar of Motor Vehicles pursuant to the court order.
16. Turning to the issue of whether the Objector is entitled to a refund of **Kshs. 49,500** from the interested party, it was the Objector's case that the Auctioneer's agents extorted the said amount from him as payment for their "efforts to attach" the motor vehicle. The interested party in his replying affidavit vehemently denied having received any monies from the Objector either directly or through his agents. This allegation being one of extortion would, if proved, amount to a criminal offence and therefore is, in my view, pursuable under a different legal regime. In any event, it would be recoverable as a civil claim as between the objector and the interested party and/or his agents, who are not parties herein. At any rate, the claim has not been proved on a balance of probabilities. It is trite law that he who alleges must prove. (**See section 107 of the evidence Act**). This burden has not been discharged by the Objector herein.
17. In view of the foregoing, the upshot of this court's ruling is that:
- a. the Objector's Notice of Motion dated **12th May 2015** and filed on even date is merited and the same is therefore allowed.
 - b. Orders to issue as prayed for in paragraphs 2, 3 and 7 thereof.
 - c. The Objector's prayer for recovery of the Kshs. 49,500 allegedly paid to the Interested Party's agents is however dismissed.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 9th day of October 2015

OLGA SEWE

JUDGE