



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 156 OF 2012

HASS PETROLEUM (K) LIMITED PLAINTIFF

VERSUS

COUNTRY MOTORS LIMITED DEFENDANT

EQUITY BANK LIMITED OBJECTOR

RULING

The Plaintiff sued the Defendant for a sum of Kshs.22,922,130/35, costs and interest and on 20th March 2014 obtained judgment on admission for a sum of Kshs.2,970,000/= together with costs. It then set out vide the application for execution of decree received herein on 6th August 2015 to Igare Auctioneers. It is not clear what happened to that application as another application was made on 9th October 2015. Warrants of attachment and sale of the Defendant/Judgment Debtor's property were then issued to Joni Consult Auctioneers. Apparently when the Auctioneers issued the proclamation Country Farms Limited and Equity Bank herein referred to as the 1st Objector and 2nd Objector filed Notices of Objection. The notices were accompanied by applications and affidavits as required under Order 22 Rule 51 Rule 2 of the Civil Procedure Rules and were duly served upon the Plaintiff/Decree Holder. The 1st Objector's Notice of Objection and application were placed before a Judge on 14th October 2015 who ordered a stay of execution pending hearing of the objection proceedings. That of the 2nd Objector was filed on 28th October 2015 and on the same day the Court stayed execution and ordered that the application be heard on 2nd November 2015. It directed that the Decree Holder/Respondent be served.

Upon being served the Decree Holder filed a replying affidavit sworn by Abdi Rashid its Legal Manager. The same is dated 2nd November 2015. He deposes that the vehicles are the property of the Judgment Debtor and urges the Court to dismiss the objection proceedings.

At the hearing the 1st Objector was represented by Mr. Muma Advocate, the 2nd Objector by Mr. Yogo Advocate and the Decree Holder by Mr. Hassan Advocate.

Whereas in her application the 1st Objector had sought orders to raise the attachment on Motor Vehicle KAX 009M, KAY 900J, KAX 099M, KCB 909P, KAT 774C, KAX 990K and KCC 075Q, Mr. Muma, for the 1st Objector urged the application only in respect of Motor Vehicles KCC 075Q, KCB 909P and KAY 900J. He intimated that that was because his client had no evidence of ownership of the rest of the vehicles. Referring to copies of log books annexed to the affidavit he submitted that the three motor vehicles belonged to his client but not to the Judgment Debtor. He contended that a log book is prima evidence of ownership and no contrary evidence arises from the replying affidavit. He also took issue with the omission to file a Notice to proceed but as earlier stated the Decree Holder/Respondent is

excused as really this Court did not call upon him to make the intimation as it ought to have done.

Mr. Yogo, for the 2nd Objector submitted that as his client had financed the purchase of Motor Vehicles KAX 009M, KAX 099M, KAX 990K and KAT 774C they were not the sole property of the Judgment Debtor and could not be attached. He relied on an agreement between his client and the Judgment Debtor dated 21st February 2011 – "annexture JW1" and urged this Court to raise/lift the attachment.

Mr. Hassan, Learned Counsel for the Decree Holder/Respondent opposed the application by the Objectors. He submitted that they were made in bad faith and were an attempt to deny the Plaintiff of the judgment obtained by the defendant's own admission in 2012. He submitted that based on the 1st Objector's annexures the vehicles belong to the Judgment Debtor and the 2nd Objector. He further submitted that the 1st Objector and the Judgment Debtor herein are one and the same and that therefore the corporate veil ought to be lifted in favour of the Decree Holder. On the Notice to proceed with attachment he explained that the reason it was not filed was because they did not want to burden this Court with too many applications and citing Article 159 of the Constitution submitted that undue regard should not be had to technicalities. With due respect that is a misapprehension of Order 22 Rule 52 and as this Court is partly to blame it shall not dwell on that issue. He submitted that other than the log books there was no other evidence of ownership of the motor vehicles and that it was not clear how the vehicles KAY 900J, KCB 909P and KCC 075Q had been moved from the defendant to the objector. He particularly made reference to Motor Vehicle KAY 900J. He urged this Court to dismiss the objection or in the alternative to order security for costs pending determination of ownership of the vehicles.

In regard to the 2nd Objector's application he read malice in the application stating that it was only served upon him on 30th October 2015 at 3pm yet it was filed on 27th October 2015. On the merits he submitted that the agreement relied on by the 2nd Objector has already run its course as it was to lapse 48 months from March 2011 and cannot be the basis of the said objector's claim. He also submitted that the said agreement did not make reference to any of the attached vehicles and that log books had been provided twice to show ownership of Motor Vehicle KAX 009M. He urged the Court to find that both objectors lacked locus standi and dismiss their objections.

In reply Mr. Muma reiterated his submissions in regard to the Notice to proceed and contended that a replying affidavit cannot stand in isolation. He also submitted that constitutional provisions cannot be used to circumvent a mandatory requirement. He further stated that there was nothing to show that the transfer of the vehicles was to circumvent the judgment. On the application by Mr. Hassan to lift the veil he submitted that that ought to be a separate application so that the parties can be allowed to file their responses. He urged the Court to allow the application by his client.

On his part Mr. Yogo apologised to Mr. Hassan for the late service but observed that as he had responded to the application in full there was no prejudice. As for the agreement he seemed to be saying that time was not of the essence as the terms were that it would be repaid by 48 instalments until fully paid. He urged the Court to allow the 2nd Objector's application.

I must begin by saying that there was a lapse on the part of the Court in regard to the procedure upon filing a Notice of Objection in that it did not comply with Order 22 Rule 52 of the Civil Procedure Rules which states:-

"Upon receipt of a valid notice and application as provided under rule 51, the Court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the Court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part." (underlining mine).

That may have occasioned the Judgment Debtor's failure to file the intimation as provided in Rule 54 and to which Mr. Muma vehemently objected.. I shall however not make much of that omission as mistakes of the Court ought not to be visited on a litigant and shall instead go into the merits of the objections. For the 1st Objector he has exhibited copies of log books which show her to be the owner of Motor Vehicles

KAY 900J, KCB 909P and KCC 075Q. Such log books are prima facie evidence of ownership, unless the contrary is proved. The Decree Holder's submission that their ownership was transferred to frustrate enjoyment of the fruits of her judgment is not backed by evidence and I also agree with Mr. Muma that an application for lifting the veil cannot be made orally as was done here. The objection by the 1st Objector would therefore have succeeded.

As for the 2nd Objector's application I shall first deal with the allegation of malice. Order 22 Rule 51(3) provides for service of the Notice of Objection and application within seven days. Order 22 Rule 52(3) empowers the Court to stay execution for not more than fourteen days. The Notice calling upon the Decree Holder issued under Rule 53 is required to prescribe the period within which the Decree Holder should indicate his/her intimation to proceed with execution or not and Rule 54 provides that if that intimation is in the affirmative the application must be heard expeditiously. In this case the Court ordered a shorter period for both service and the hearing. This was perfectly within its power to do and Mr. Yogo is therefore absolved of any malice.

However, on the merits his client's application would not have succeeded. Whereas it is true that the 2nd Objector is registered as owner of the vehicles jointly with the Judgment Debtor according to Mr. Yogo, its ownership is anchored on it being a financier of the Judgment Debtor pursuant to the agreement attached as annexure "JA1". I have read that agreement very carefully and firstly it is not a Hire Purchase agreement as intimated by the deponent of the supporting affidavit. The purpose of the loan facility advanced by the agreement is set out in Clause 2 and it is "for consolidation current outstanding facilities and restructuring." Nowhere does it state it is for financing purchase of the vehicles. Secondly the loan facility was clearly for 48 months which by the time of the Notice to Object had lapsed and it cannot therefore form the basis for the objection. Thirdly and more importantly as Mr. Hassan submitted except for Motor Vehicle KAT 774C which is named in the agreement none of the other vehicles claimed by the Objector feature. That being the case the prima facie evidence contained in the log books exhibited by the 1st Objector is displaced. She cannot anchor her ownership of these other vehicles on this agreement per se and her claim to registration is therefore suspect. That notwithstanding it is my finding that the application for execution herein having been made more than one year (6th August 2015) after the date of the decree (9th June 2014) the proper procedure would have been to issue a notice to show cause as provided in Order 22 Rule 18(1)(a) of the Civil Procedure Rules. The execution was therefore defective. The attachment is therefore lifted.

As for costs I direct that as only the 1st Objector would have succeeded she shall get costs of the objection proceedings as against the Judgment Debtor. The 2nd Objector shall bear her own costs of the application. The Judgment Debtor shall bear the auctioneer's costs in both instances. It is so ordered.

Signed, dated and delivered at Kisumu this 6th day of November 2015

E. N. MAINA

JUDGE

In presence of:-

Mr. Abdi Rashid for the Plaintiff/Decree Holder (Legal Officer)

N/A for the Defendant/Judgment Debtor

Mr. Muma Advocate for the 1st Objector

Mr. Muma Advocate for the 2nd Objector (H/B for Mr. Yogo)

CA: Felix Magutu