



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
HCCA NO. 193 OF 2011

JACQUELINE ADHIAMBO OBEL.....APPELLANT

VERSUS

FAMILY BAND LTD1ST RESPONDENT

JOHN ODONGO NYILIMA.....2ND RESPONDENT

MANUEL OTIANGALA T/A KURONYA AUCTIONEERS...3RD RESP

*(An appeal from the Ruling of P.ACHIENG, Resident Magistrate in BGM CMCC No. 699 of 2010
delivered on 28th September 2011)*

JUDGMENT

1. The Appellant was the objector in Bungoma CMCC No. 699 of 2010 whose proceedings is the subject of this appeal. The 1st Respondent, Family bank Ltd had attached goods through the 3rd Respondent which goods the Appellant alleged belonged to her.

2. The Appellant commenced objection proceedings against the attachment. The learned trial magistrate in his ruling delivered on 28th September 2011 dismissed the objection application. It is against this ruling that the Appellant has listed 6 grounds challenging it. The grounds are;

1. That the learned trial magistrate erred in law and in fact in making a finding that the properties attached and to which the Appellant laid claim belonged to the 2nd Respondent.

2. That the learned trial magistrate erred in law and in fact in failing to uphold the objection when there was clear, overwhelming and cogent proof that the attached properties were owned by the Appellant.

3. That the learned trial magistrate erred in law and in fact in failing to appreciate that even though the Appellant had been married to the 2nd respondent, the two were no longer together by the time of the attachment of the properties herein.

4. That the learned trial magistrate erred in law and in fact in failing to make a finding that the circumstances of this matter were such that it was erroneous to assume that the properties of the Appellant belonged to the 2nd Respondent.

5. That the learned trial magistrate erred in law and in fact in failing to make a finding that the Appellant was never a party to the suit between the Plaintiff (1st Respondent) and the Defendant (2nd Respondent) in the lower Court and should not have made an adverse order against the Appellant.

6. That the learned trial magistrate erred in law and thus coming to a wrong and/or erroneous decision thus causing injustice to the Appellant.

3. The Appellant and the Respondents filed their submission as a mode of prosecuting the appeal. Mr. Odhiambo advocate for the Appellant submitted that the Appellant was the registered owner of the land and premises on which the attachment was undertaken. That under article 40 (1) of the Constitution, the appellant is entitled to own land anywhere in Kenya. He submitted further that there was no privity of contract between the Appellant and the 1st Respondent. He continued that the Appellant was the estranged wife of the 2nd Respondent in the objection proceedings). According to the Appellant, estrangement is a form of desertion and therefore the learned Magistrate was wrong on placing the extra burden of proof on her.

4. Finally the Appellant submitted that demand to produce receipts of the attached property was unreasonable. The receipts were unnecessary because the objector was assumed to own the land, household property and animals therein. That the magistrate was manifestly biased.

5. The Respondent in opposing the appeal submitted that the Appellant has brought out issues in their submissions not captured in the memorandum of appeal. This is contrary to the provisions of order 42 rule 4 of the Civil Procedure Rules. Secondly that it is a cardinal principle of law that he who asserts must prove. That the Appellant did not prove the goods attached were legally owned by her. Mr. Ocharo submitted that the Appellant failed to show whether the house was built before or after the estrangement and when she acquired the attached goods.

6. The Respondent submits further that the Appellant did not show any letter to fortify the fact of estrangement. In their view, the Magistrate's finding was well reasoned and meritorious. He urged the court to dismiss this appeal with costs.

7. To begin with, the Appellant submits that it was not incumbent upon her to prove the allegation of estrangement or produce receipts of the attached goods. In answering this, I refer to the case of **Michael A. Mashere vs. Samson Asatsa Civ. Appeal No. 76 of 1987**, where the court of appeal held *that the onus of proof in objection proceedings is on the objector to establish ownership*. In the case of **Kenya Oil company Ltd. vs. Fuaad Mahmoud Mohammed & others Nbi (Milimani) HCC No. 886 of 2002**, Ringera J (as he then was) held that the burden of proof is on the objector to establish a legal or equitable interest in the property subject matter of execution objected to, which burden is to be discharged on a balance of probability. It is not for the decree holder to prove that the goods belong to the Defendant.

8. The issue for this court to determine is whether the Appellant discharged that burden and therefore the trial magistrate was wrong in reaching a finding that dismissed the objection application. This is a first appeal therefore I am permitted to re-evaluate the facts/evidence presented to the subordinate court. In the supporting affidavit sworn by the Appellant on 3rd August 2011 par 4, she deponed that she separated from the Defendant (2nd Respondent) and developed a house on L.R. Bukhayo/Mundika/7051 furnished it and kept some cattle on it. She annexed copy of the title deed for the plot which showed the land was registered in her name.

9. In paragraph 5 - 9, she deponed that the actions of the 3rd Respondent in proclaiming and carrying away her goods including Kshs. 50,000/= that was inside the wall unit was unlawful. The Appellant depones further in paragraph 9 that she has both legal and equitable rights in the attached properties. It seems to me from the pleadings and evidence before the subordinate court that the Appellant relied as proof of ownership of the goods attached was due to the fact that she is the registered owner of the land on which the house and household goods were taken from. She also relied on the fact of the estranged relationship between her and the 2nd Respondent.

10. Mr. Ocharo for the respondent in opposing the appeal submitted that the estrangement was a mere allegation. He contended the Appellant did not prove to the trial court whether the house was built before or after the estrangement by exhibiting approved building plans or disclosing the source of her finances. That the Appellant did not prove by documentary evidence that she had purchased the goods attached by the 3rd Respondent.

11. The Appellant in response to those submissions stated that providing the receipts were an unreasonable demand. That by the court finding she ought to have produced the receipts was shifting the burden on her to prove her case beyond reasonable doubt.

12. The Appellant's title exhibited indicates she became registered owner of the property on 16th July 1999. She submitted that they were estranged with the 2nd Respondent in the year 2008. Other than her statement in the affidavit, she did not call any evidence to corroborate this deposition. Secondly, the Respondent submitted that the Appellant did not produce any documentary evidence to show the goods attached were owned by her which submission she dismissed as being unrealistic.

13. The parcel of land was not proclaimed by the Auctioneer (3rd Respondent). What was taken were household goods and animals. She needed therefore to convince the trial court on the ownership of the goods that were the subject matter of the attachment and not the land. She did not exhibit any single receipt of purchase of the household goods to demonstrate that the items were purchased by her after 2008 as she deponed or any time. In my view, she could have even shown receipt of paying a veterinary officer or purchasing drugs used to take care of the animals carted away. She also did not even call the house girl who was in the house when the proclamation was dropped by the 3rd Respondent to corroborate her evidence.

14. In the absence of such evidence the trial learned Magistrate had no option but to reach the decision that she made. During the hearing of this appeal, the Appellant did not seek leave of the court to adduce further evidence. I do find that the Appellant did not discharge the burden placed on her by law to prove the goods taken away belonged to her. Her argument that burden shifted to the Respondent was a wrong presumption (see **Michael Machere** case supra). The rule of procedure is that "*he who asserts/alleges must prove,*" (Order 18 rule 2 of the Civil Procedure Rules). She alleged ownership but did not establish her claim by evidence. I therefore do not find any reason why I should tamper with the finding of the honourable Magistrate's decision. In the result I find this appeal as lacking in merit and dismiss it but order each party to bear their costs.

DATED, SIGNED and DELIVERED this 13th of day of May 2014

A. OMOLLO

JUDGE.